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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2014] WASCA 186

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	LANDSHEER -v- MORRIS CORPORATION (WA) PTY LTD [2014] WASCA 186
CORAM	**:**	BUSS J
		LE MIERE J
		KENNETH MARTIN J
HEARD	**:**	25 AUGUST 2014
DELIVERED	**:**	20 OCTOBER 2014
FILE NO/S	**:**	IAC 1 of 2014
BETWEEN	**:**	JOHANNA LANDSHEER
		Appellant
		AND
		MORRIS CORPORATION (WA) PTY LTD
		Respondent
ON APPEAL FROM:		
Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	SMITH AP
		SCOTT ASC
		MAYMAN C
Citation	**:**	LANDSHEER v MORRIS CORPORATION (WA) PTY LTD [2014] WAIRC 34

Catchwords:

Industrial law - Contractual benefits claim under common law - Contract of employment - Jurisdiction to appeal - No error of statutory construction by Full Bench - Appeal incompetent

Legislation:

Industrial Relations Act 1979 (WA), s 29(1)(b)(ii), s 90(1)(b)

Result:

Application upheld

Appeal dismissed for want of jurisdiction

Category: B

Representation:

Counsel:

Appellant	:	Mr T Hammond (counsel)
Respondent	:	Mr A Cameron (agent)
Solicitors:		
Appellant	:	Fiocco's Lawyers
Respondent	:	Australian Mines and Metals Association

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

BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191

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

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 [1982] HCA 24; (1982) 149 CLR 337

Commonwealth Bank of Australia v Barker [2014] HCA 32

Landsheer v Morris Corporation (WA) Pty Ltd [2013] WAIRC 574

Landsheer v Morris Corporation (WA) Pty Ltd [2014] WAIRC 34

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

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

Personnel Contracting Pty Ltd T/As Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers [2004] WASCA 312

Robertson v Civil Service Association of Western Australia Inc [2003] WASCA 284

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

United Construction Pty Ltd v Birighitti [2003] WASCA 24

University of Western Australia v Gray [2009] FCAFC 116; (2009) 259 ALR 224

1 **BUSS J**: On 7 March 2014, the respondent applied to this court for the summary dismissal of the appeal on the ground that this court does not have jurisdiction to hear the appeal.

2 I am satisfied that this court does not have jurisdiction and that the appeal must therefore be dismissed.

The background facts and circumstances

3 The background facts and circumstances are set out in the reasons of Kenneth Martin J (with whom Le Miere J has expressed his agreement). I will not repeat them except to the extent necessary to explain my reasons.

4 On 9 August 2012, the appellant lodged an application with the Western Australian Industrial Relations Commission (the Commission) claiming that the respondent owed her unpaid wages under a contract of employment. Commissioner JL Harrison heard the application and dismissed it. See ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2013] WAIRC 574.

5 The appellant's appeal to the Full Bench of the Commission was also dismissed. See ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2014] WAIRC 34.

The appellant's grounds of appeal to this court

6 The appellant relies on three grounds in her appeal to this court.

7 The grounds, without the supporting particulars, read:

> **Ground 1:**
>
> In coming to their finding that [the] Appellant was not denied a contractual benefit pursuant to s 29(1)(b)(ii) of the Act (see [49]), the Full Bench erred in law in concluding that the terms of the Appellant's contract of employment were confined to what was set out in a written agreement between the employee and the employer (the 'Contract' as defined by the Full Bench at [10] of their reasons, but referred to in these grounds as the 'agreement').
>
> **Ground 2:**
>
> Having erred in failing to take into account relevant surrounding circumstances in determining the material terms of the contract of employment, the Full Bench erred in law in arriving at a conclusion that *'the principle of "wages-work" bargain … does not extend to a right to be paid for every hour of work'* in

> the context of the Appellant's common law contract of employment that was the subject of this dispute: See reasons at [46]. (original emphasis)
>
> **Ground 3:**
>
> The Full Bench erred in law by concluding that *'"all up" rates of pay in employment contracts are not uncommon'* (at [46]) and that there was *'no scope to imply a term on the grounds of fact of a right to "reasonable remuneration for each hour of work"'* (at [48]) when there was no evidence before the Full Bench, or the Commission to support such a finding. (original emphasis)

The relevant provisions of the *Industrial Relations Act 1979* (WA)

8 The relevant provisions of the *Industrial Relations Act 1979* (WA) (the Act), for the purposes of this appeal, are as follows.

9 Division 2 of pt II of the Act is headed 'General jurisdiction and powers of the Commission' and comprises s 22A - s 36.

10 Section 23(1) provides that, subject to the Act, the Commission 'has cognizance of and authority to enquire into and deal with any industrial matter'.

11 The term 'industrial matter' is defined in s 7(1) to mean, relevantly:

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

12 Section 29 specifies by whom an 'industrial matter' may be referred to the Commission. By s 29(1):

> An industrial matter may be referred to the Commission -
>
> (a) in any case, by -
>
> (i) an employer with a sufficient interest in the industrial matter;
>
> (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
>
> (iii) the Minister;
>
> and
>
> (b) in the case of a claim by an employee -
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee.

13 Part IV of the Act is headed 'Western Australian Industrial Appeal Court' and comprises s 85 - s 92.

14 This court's jurisdiction is specified in s 90(1), which provides:

> Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground.

15 The other provisions of s 90 are not relevant in determining whether this court has jurisdiction to hear this appeal.

The appellant's submissions

16 The appellant asserts that this court has jurisdiction under s 90(1)(b) of the Act.

17 Counsel for the appellant, in his written submissions, argued that:

(a) the Full Bench failed 'to properly interpret and define' the term 'contract', within s 29(1)(b)(ii) of the Act;

(b) as a result of that failure, the appellant 'was denied a contractual benefit to which she was otherwise entitled; namely, payment for additional hours she was ordered by [the respondent] to work over a period of approximately two years';

(c) if the Full Bench 'had properly applied established principles of … contract law … the appellant would have satisfied the conditions of s 29(1)(b)(ii) of the Act and been entitled to damages, namely a payment of an additional $67,479.46'; and

(d) because the Full Court 'was in error in their identification of the material terms of the employment contract, their application of [s 29(1)(b)(ii)] of the Act was in error; and the appellate jurisdiction of this court is accordingly enlivened: see s 90(1)(b) of the Act'.

18 At the hearing of the respondent's application for the summary dismissal of the appeal, counsel for the appellant contended that:

(a) s 29(1)(b) of the Act requires the Full Bench not to make an error in determining the terms of the contract of employment in question or the employee's entitlement under the contract; and

(b) if the Full Bench makes either or both of those errors, the Full Bench will have infringed s 29(1)(b) because the employee's claim will not have been accepted and determined by the Commission; that is, although the employee's claim will have been referred to the Commission, the Commission will not have accepted and determined the claim because any purported acceptance and determination of it will have been vitiated by either or both of the errors (appeal ts 11 - 12).

19 Counsel for the appellant submitted at the hearing that his contention was supported by the decision of this court in ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114.

The merits of the appellant's submissions

20 The appellant's submissions in relation to s 29(1)(b) of the Act, and the application of that provision in this appeal, are without merit.

21 It was agreed between the parties, and Commissioner Harrison and the Full Bench proceeded on the basis, that:

(a) at all material times there was a contract of employment between the appellant and the respondent under which the appellant was the 'employee' (as defined in s 7(1) of the Act) and the respondent was the 'employer' (as defined in s 7(1));

(b) the appellant's claim against the respondent, the subject of the proceedings before the Commission and the Full Bench, was an 'industrial matter' (as defined in s 7(1) of the Act); and

(c) the appellant had referred the industrial matter in question to the Commission.

22 Section 29(1) of the Act specifies by whom an industrial matter may be referred to the Commission. Section 29(1) confers standing on an employee and an employer, in certain circumstances, to refer an industrial matter to the Commission. Section 29 does not confer jurisdiction or additional powers on the Commission. See ***BGC (Australia) Pty Ltd v Phippard*** [2002] WASCA 191 [26] (Hasluck J, Anderson & Parker JJ agreeing).

23 Section 29(1)(b) does not stipulate any jurisdictional facts and does not, either expressly or impliedly, prescribe any principles of law which must be applied by the Commission or the Full Bench in determining an industrial matter referred to the Commission under that provision. Further, s 29(1)(b) does not require the Commission (including the Full Bench) not to make an error of law or fact in determining the merits of an industrial matter referred to the Commission.

24 If the Commission (including the Full Bench) makes an error of law or fact in determining the merits of an industrial matter referred to the Commission under s 29(1), that error will not vitiate either the reference of the industrial matter under s 29(1) or the acceptance of the matter by the Commission (including the Full Bench).

25 A decision of the Full Bench on the merits of an industrial matter referred to the Commission under s 29(1) will only confer a right of appeal on a person who is dissatisfied with the decision if one or more of the grounds specified in s 90(1) applies to the decision.

26 In the present case, the appellant's complaints about the Full Bench's decision are about alleged errors that do not enliven this court's jurisdiction. In particular:

(a) ground 1 of the appeal asserts that the Full Bench erred in its identification of the terms of the contract of employment;

(b) ground 2 asserts that the Full Bench erred in failing to take into account 'relevant surrounding circumstances' in determining the material terms of the contact of employment; and

(c) ground 3 asserts that the Full Bench made certain findings that were not supported by any evidence.

27 None of the grounds of appeal alleges, either in form or in substance, that the Full Bench made an error, within s 90(1)(b), in the construction or interpretation of the Act in the course of making the decision.

28 The decision of this court in ***Matthews*** does not support the appellant's contention that this court has jurisdiction to hear the appeal.

29 In ***Matthews***, the appellant's ground of appeal alleged that the Full Bench's decision to 'cap' an award made in favour of the appellant in the amount of $79,920 was erroneous. It was asserted that the Full Bench made the error because it overlooked the fact that the appellant's claim, based upon the denial of a contractual benefit in the form of reasonable notice, was brought pursuant to s 29(1)(b)(ii) of the Act and, consequently, s 23A, which provided for a 'cap' in the case of compensation for loss or injury caused by a harsh, oppressive or unfair dismissal, had no application [11].

30 This court allowed the appeal in ***Matthews*** because the Full Bench, in the course of making the decision appealed against, made an error in the construction or determination of the Act. The Full Bench wrongly 'capped' the award made in favour of the appellant and the error arose from the Full Bench's misconstruction of the Act.

Conclusion

31 The respondent has established that this court does not have jurisdiction to hear the appeal. Its application for summary dismissal should be allowed. The appeal must be dismissed.

32 **LE MIERE J**: This appeal should be dismissed on the ground that this court does not have jurisdiction to hear the appeal for the reasons stated by Kenneth Martin J.

KENNETH MARTIN J:

Overview

33 On 14 February 2014 the appellant, Ms Landsheer, caused a notice of appeal to be filed in this court by which she seeks to reverse a decision of the Full Bench of the Industrial Relations Commission (see ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2014] WAIRC 34). The Full Bench had on the appeal to it, unanimously upheld a decision of Commissioner J L Harrison (see ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2013] WAIRC 574) which had dismissed Ms Landsheer's money claim against her employer, the respondent.

34 Ms Landsheer's unsuccessful claim had been advanced before the Industrial Commission as a claim for contractual benefits, claimed as due to her under her contract of employment with the respondent.

35 The essence of Ms Landsheer's claim was she had been wrongly denied payment by her employer for the additional hours she had been required to work as a kitchen hand - when employed at the Cloudbreak mine, under circumstances where she was engaged under a fly-in/fly-out (FIFO) two weeks on / one week off, employment arrangement.

36 Shortly after appeal papers were lodged in this court, the respondent filed a motion seeking that Ms Landsheer's appeal be dismissed for want of jurisdiction in this court. In essence, the respondent contends the jurisdictional gateway that is necessary to be opened under s 90(1)(b) of the *Industrial Relations Act 1979* (WA) (the IR Act) (as amended), is not open to Ms Landsheer, under her proposed appeal. Hence, it is contended there is no proper jurisdictional basis raised by Ms Landsheer to advance before this court her three proposed grounds of appeal which were filed on 14 February 2014.

37 On 18 June 2014, it was ordered that the respondent's motion seeking to have Ms Landsheer's appeal dismissed, be listed for a separate hearing. If the respondent's motion succeeds, it will have been shown there is no jurisdiction for this court under s 90(1) to proceed to determine the merits of Ms Landsheer's proposed appeal and, in that case, her attempted appeal must be dismissed.

Two key legislative provisions in the IR Act

38 The terms of s 90(1)(b) of the IR Act provide:

> (1) Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) …
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) …
>
> but upon no other ground.

39 There is no dispute that the appeal sought to be advanced by Ms Landsheer in this court is jurisdictionally grounded solely upon an attempted invocation of s 90(1)(b) of the IR Act. Annexure A to Ms Landsheer's notice of appeal, filed by her solicitors on 14 February 2014, displays three proposed grounds of appeal, and says:

> 1. This appeal is brought pursuant to s 90(1)(b) of the *Industrial Relations Act 1979* (WA) (the Act).

40 Ms Landsheer contends that the legislation (for the purpose of her attempted identification under s 90(1)(b) of an 'Act', in respect of which it is argued that there has been some error by the Full Bench in relation to construction or interpretation, in the course of making the decision appealed against), is the IR Act itself. The asserted error of statutory construction is said to arise by reason of the Full Bench's contended misinterpretation of s 29(1)(b)(ii) of the IR Act. Paragraph 2 of annexure A to Ms Landsheer's notice of appeal, reads:

> 2. The decision of the Full Bench in ***Landsheer v Morris Corporation (WA) Pty Ltd*** [2014] WAIRC 35, is erroneous in law on the basis that there is an error in the interpretation by the Full Bench of s 29(1)(b)(ii) of the Act.

41 The character of the asserted error in statutory construction is somewhat obliquely raised at par 3 of annexure A:

> 3. The Full Bench erred in law by:
>
> (a) failing to properly apply established principles relating to terms to be implied into a contract of employment; and
>
> (b) taking into account irrelevant considerations.

42 As a result, it is necessary to examine immediately the terms of s 29(1)(b)(ii) of the IR Act. This is the key statutory provision said by Ms Landsheer to have been misinterpreted by the Full Bench and therefore, is at the heart of this application to dismiss for want of jurisdiction.

43 Section 29(1) of the IR Act provides:

> (1) An industrial matter may be referred to the Commission -
>
> (a) in any case, by -
>
> (i) an employer with a sufficient interest in the industrial matter; or
>
> (ii) an organisation in which persons to whom the industrial matter relates are eligible to be enrolled as members or an association that represents such an organisation; or
>
> (iii) the Minister;
>
> and
>
> (b) in the case of a claim by an employee -
>
> (i) that he has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment,
>
> by the employee.

44 Ms Landsheer's proposed appeal asserts that the Full Bench erred in its interpretation of s 29(1)(b)(ii). As will be seen, it is not easy to see where in the reasons of the Full Bench such an error appears.

Jurisdictional limits set under s 90(1) of the IR Act limiting an appeal to the IAC

45 Section 90(1) of the IR Act has received consideration by this court in a series of earlier decisions. Appeals were taken to this court in the aftermath of amendments to s 90 which were implemented under the *Labour Relations Reform Act 2002*, taking effect from 1 August 2002.

46 In ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24, Hasluck J observed:

> [99] Section 90(1) in its amended form clearly reflects a parliamentary intention to limit the jurisdiction of the Industrial Appeal Court to certain prescribed areas of disputation and that intention must be respected. For myself, I cannot see that the new phrase 'erroneous in law' represents any significant departure from the former concept of 'error in law'. The term 'erroneous in law' seems to have been used principally so that the grammar conforms to the structure of the provision.
>
> [100] It follows from this view of the matter that the restriction intended to be imposed is to be found principally in the following words 'in that there has been an error in the construction or interpretation of any act …'This clearly suggests that it is not enough for the prospective appellant to point to some error of law according to common law principles. That which is said to be 'erroneous in law' must be linked to the presence of a statutory provision which purports to govern the situation.

47 Hasluck J (with Scott J) concluded this court held jurisdiction under s 90(1)(b).

48 In that appeal the statutory definition of 'employee' in the *Long Service Leave Act 1958* (WA) was highly material to the required exercise of ascertaining whether or not Mr Birighitti had successfully establish an employee's entitlement to long service leave under the *Long Service Leave Act*. A question of law had emerged, over the correct meaning of what was a technical legal term (ie, the word 'employee', used in the *Long Service Leave Act*: see [103] per Hasluck J).

49 Consequently, in that appeal the Industrial Appeal Court could exercise its appellate jurisdiction, under s 90(1)(b). The underlying issue was over the correct meaning of the term 'employee', wrongly interpreted, as it was held in the end, by the Full Bench: see [104] per Hasluck J (Anderson J dissenting).

50 Section 90(1) was the subject of further observations in ***Robertson v Civil Service Association of Western Australia Inc*** [2003] WASCA 284. An appeal was lodged against a decision of the President of the Industrial Relations Commission. In the end, the jurisdictional issue was resolved affirmatively, allowing the appeal to be evaluated on its merits: see [25] (Hasluck J) and [56] (EM Heenan J). EM Heenan J had considered the potential applicability of s 90(1)(b), from a jurisdictional perspective. Again in that appeal there had manifested an underlying argument about an asserted erroneous interpretation (by the President of the Industrial Relations Commission) of s 61 and s 66 of the IR Act, thereby raising asserted errors of law, properly to be determined in an appeal to this court: see [53] and [56].

51 The issue of this court's jurisdiction arose again in ***BHP Billiton Iron Ore Pty Ltd v Construction, Forestry, Mining & Energy Union of Workers*** [2006] WASCA 49, see the reasons of Le Miere J at [98] discussing s 90(1)(b) (with whom, in respect of appeal IAC 6 of 2005, Wheeler and Pullin JJ agreed, see [1] and [6]).

52 Argument arose in an aspect of that appeal (IAC 6 of 2005) over a contention the Full Bench had erred by concluding a Mr Brandis had not been employed under a contract of employment and was an independent contractor. It was argued the

Full Bench wrongly construed the provisions of the IR Act, relating to the meaning of 'employer' and 'employee' and had wrongly determined arguments adverse to the employee when applying those statutory criteria: see [99].

53 Upholding the jurisdictional objection in IAC 6 of 2005, Le Miere J observed, after closely examining ***United Construction Pty Ltd v Birighitti*** at [101] and ***Personnel Contracting Pty Ltd T/As Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers*** [2004] WASCA 312 at [102], that:

> [109] Appealable questions of law may arise from the reasoning of the Full Bench on the way to its ultimate conclusion. If the Full Bench were, for example, to misinterpret the provisions of the Act, defining 'employee' or 'employer' in the course of deciding that Mr Brandis was not employed under a contract of employment with BHPB that would be an error of law in the construction or interpretation of the Act and would be appealable under s 90(1)(b).
>
> [110] An appeal cannot be made, however, on the ground that there has been an error in the construction or interpretation of the Act where the Full Bench has merely applied law which it has correctly understood to the facts of an individual case. It is for the Full Bench to weigh the relevant facts in the light of the applicable law.

See also [120], [126] and [127].

54 A further decision of this court touching upon s 90, ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114, is discussed later in these reasons.

55 The law concerning the limited jurisdiction of this court as established by these decisions now needs to be applied to the underlying facts, to which I turn.

The respondent's jurisdictional objection

56 The failed claim by Ms Landsheer, in the Commission at first instance, later rejected by the Full Bench, had sought payment from the respondent on the basis of the additional hours of work performed by her as a kitchen hand. It was not controversial that Ms Landsheer:

(a) advanced a claim as an employee;

(b) advanced a claim which fell within the jurisdiction of the Industrial Relations Commission as an industrial matter for determination; and

(c) sought payment from her employer for a contractual benefit (wrongly) claimed to have been denied to Ms Landsheer, who argued that she held an entitlement to receive remuneration for additional hours which she had been required to work by her employer under her contract of employment.

57 Furthermore, as is apparent from her proposed grounds of appeal, it was, and remains, accepted as being common ground that Ms Landsheer had been employed 'pursuant to a common law contract of employment': see particulars (b) to grounds 1 and 2 of the proposed appeal. Each ground expressly refers to Ms Landsheer's 'common law contract of employment', as being the 'subject of this dispute'.

58 As indicated, it is also apparent that the asserted 'decision erroneous in law' now contended for by Ms Landsheer (to ground the appellate jurisdiction of this court) under s 90(1)(b) - is asserted to have been made by the Full Bench under its (contended as erroneous) construction of s 29(1)(b)(ii) of the IR Act.

59 The respondent's jurisdictional challenge may now be seen to distil to an evaluation of whether the decision of the Full Bench (by Acting President J H Smith, with whose reasons Scott ASC and Mayman C agreed) does arguably manifest some element(s) of an erroneous statutory interpretation towards the phrase 'contract of employment' - as used within s 29(1)(b)(ii) of the IR Act.

60 To that end, I turn to examine the reasons of the Full Bench of the Industrial Relations Commission in ultimately rejecting Ms Landsheer's claim.

The Full Bench's reasons

61 Acting President Smith's reasons commence by recounting some factual background underlying Ms Landsheer's claim. It was observed at par 2:

> It is common ground that Ms Landsheer entered into a written common law contract of employment. However, Ms Landsheer claims that the written agreement did not contain all the terms and conditions of her employment.

62 It was next observed Ms Landsheer (see par 3) had been employed by the respondent as a kitchen hand under FIFO arrangements. Her place of employment was the Cloudbreak mine site in the north-west of Western Australia.

63 Smith AP then set out what were comprehensive terms within the written contract. There is an extensive quotation from those written terms under par 10.

64 At par 13 Smith AP observed:

> Though the written common law contract was described in its terms as an Australian Workplace Agreement, the agreement between the parties was not formally registered as an Australian Workplace Agreement. Thus, the agreement could only have effect as a common law contract of employment.

(As I have already observed, there is no controversy over that proposition raised before this court.)

65 Smith AP summarised the reasons for decision of the Commissioner at first instance. She noted the Commissioner had said ([15](e)):

> At all material times, Ms Landsheer was an employee of Morris Corporation and she was employed under a contract of service. This claim is an industrial matter for the purposes of s 7 of the Act as it relates to wages Ms Landsheer claims are due to her arising out of her employment with Morris Corporation. The benefit that Ms Landsheer is claiming does not arise under an award or order of this Commission. The issue to be determined, therefore, is what were the terms of Ms Landsheer's contract of employment with Morris Corporation and whether it was a term of the contract of employment that Ms Landsheer is entitled to the payment for the additional hours worked by her since March 2009 and superannuation entitlements on the amount claimed.

66 Smith AP noted ([15](k)) Ms Landsheer's argument in the Commission was that it was:

> ... necessary to imply additional terms into the contract as there is no express term allowing Morris Corporation to unilaterally vary a fundamental term of the contract, that is, increasing the hours to be worked by Ms Landsheer without her being paid additional remuneration, is rejected. The written contract contains term which allow and contemplate her working up to 12 hours in each shift for the same rate of pay as when she worked a 10-hour shift, without a review of her remuneration being required.

67 And at [16]:

> On behalf of Ms Landsheer, counsel put to the Full Bench that at the heart of the appeal is the question whether the term implied by law into almost every contract of service as a matter of course, which is the right to be paid for service performed, was a term that was breached by Morris Corporation.

68 Ms Landsheer's submissions to the Full Bench were then summarised (pars 16(a) through 16(n)). It was observed that if Ms Landsheer's contractual benefit claim were accepted, her claim for payment for her working of increased hours, with no increase in salary, would have entitled her to $62,907.76 in wages, plus $5,571.70 in superannuation entitlements: see par 17.

69 Commencing at par 18, Smith AP identified the two significant issues she considered arose before the Full Bench: see 'Principles - Ascertainment of the terms of the contract of employment'. She observed (par 18):

> The first issue to be determined in this appeal is whether the terms of employment were partly oral or wholly in writing. The second issue is whether a term or terms can be implied into the contract as a matter of fact to the effect that Ms Landsheer is entitled to be paid reasonable remuneration for each hour of work in a shift that is in addition to 10 hours of work.

70 As regards that first issue, the Acting President identified in orthodox fashion (par 29) two leading contractual interpretation decisions of the High Court in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40] and ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].

71 Concerning the second issue identified, Smith AP observed (at par 30):

> As to the second issue raised on behalf of Ms Landsheer which is whether a term or terms can be implied into the contract, the circumstances which a court or tribunal will imply a term on grounds of fact are well settled.

72 Smith AP proceeded to address what are the well-established contractual principles governing the criteria for the implication of a term on an ad hoc basis, from leading decisions, namely ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266, as endorsed by Mason J's reasons in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337. In those respects, Smith AP's reasons again recounted the underlying case law in a completely orthodox fashion. She also observed as regards terms that are implied into a contract, at par 31:

> Terms can also be implied as part of the legal relationship of employment.

73 Smith AP's observations proceeded to mention a decision of the Full Court of the Federal Court, ***University of Western Australia v Gray*** [2009] FCAFC 116; (2009) 259 ALR 224 [136] (Lindgren, Finn and Bennett JJ), then of the High Court, ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, 452 (McHugh and Gummow JJ). In that respect, once again the Acting President's observations as to contractual terms implied by law were, with respect, entirely orthodox. And see now the recent decision of the High Court, ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32 [19] - [29] (French CJ, Bell & Keane JJ).

74 Smith AP concluded at the heading 'What were the material terms of the employment contract?':

> 36. When the principles set out above are applied to the facts of this matter, the first question that must be asked is from the words 'we will be working 10-hour days' did the parties intend to be bound by a warranty that the salary rate of $1,561.63 including superannuation for each week was to be paid for work to be performed in 10-hour shifts worked each day for two weeks in a three week cycle? If that proposition is accepted, then can it be inferred that an hourly rate for work performed should be calculated on the basis that for 14 days of work in a three week cycle, 140 hours of work should be performed, which equated to an hourly rate of $30.70 per hour.

> 37. In my opinion, I cannot make those implications from the evidence. The evidence was that 'we will be working 10-hour days'. There was no discussion about how remuneration for work would be calculated … Nor could such a term be inferred from the vague statement made to Ms Landsheer at the interview.

And:

> 47. Whether a right to be paid for each hour of work in this matter depends upon the construction of the agreed terms of the contract of employment. Ms Landsheer's entitlement to wages arose expressly under the terms of the written agreement. The terms of cl 3, cl 7 and cl 9 when read together provided that the 'wages-work' bargain in the contract was that Ms Landsheer was to be paid an annualised salary calculated as pay for each week (or put another way, an 'all up' rate of pay), for working rostered shifts of hours up to 12 hours each day and that she was to be paid the same rate of pay each week including for the time she was rostered off work.

Evaluation of Ms Landsheer's argued error of statutory misconstruction by the Full Bench concerning s 29(1)(b)

75 When the reasons of the Full Bench by Smith AP (agreed with by Scott ASC and Mayman C) are closely examined, it emerges:

(a) there is no identifiable reference at any point within the reasons to a consideration by the Full Bench as to the meaning of s 29(1)(b)(ii) at any point;

(b) there has been no discernible exercise in statutory construction by the Full Bench undertaken towards the phrase 'contract of employment', within s 29(1)(b)(ii);

(c) that appeal to the Full Bench can ultimately be seen to have been argued on the basis of both parties accepting there was a common law contract of employment applicable to Ms Landsheer;

(d) the task undertaken by the Full Bench essentially involved an evaluation of arguments over the content or otherwise of Ms Landsheer's bespoken contract of employment (ie, its express terms) or, over an exercise in attempting to find within her written contract of employment once ascertained, some additional terms that were to be implied by law or fact.

(e) The exercise undertaken in the Full Bench was primarily directed at evaluating Ms Landsheer's arguments contending for the payment alleged as due to her, on the basis of being a 'contractual benefit' she asserted she held - under the terms of her employment contract (ie, by the force of express or implied terms) and seeking a payment for the additional hours she claimed to have been required to work, but without receiving the remuneration she argued was due under her contract. This became an exercise of the Full Bench applying well settled legal principles concerning common law contracts and their terms, against the presenting factual circumstances of Ms Landsheer's unique contract of employment.

(f) What transpired before the Full Bench is precisely the kind of application of the law to facts exercise that was explained by Le Miere J at [110] in ***BHP Billiton v CFMEU*** (quoted earlier at [51]) as not meeting s 90(1)(b)'s jurisdictional threshold;

(g) no part of the Full Bench's reasons displays any misinterpretation of the word 'benefit', or of the phrase 'contract of employment', as those terms are used within s 29(1)(b)(ii), such as would suggest the making of an error of law by the Full Bench that arose by reason of a misinterpretation of the statute.

Contentions by applicant responding to jurisdictional objections

76 An absence of any discernible component of the Full Bench's reasons that might arguably be said as manifesting an error in the construction or interpretation of s 29(1)(b)(ii), was a deficiency that became highlighted under the grounds (albeit they are essentially submissions) of the notice of motion,filed by the respondent on 7 March 2014. The respondent said:

> 7. In respect of ground 1 of the Appeal, the assertion that the Full Bench failed to take into account relevant surrounding circumstances in determining the material terms of the contract of employment has no relationship or relevance to s 29(1)(b)(ii).
>
> 8. In respect of ground 2 of the Appeal, the assertion that the Full Bench failed to apply particular principles of evidence again has no relationship or relevance to s 29(1)(b)(ii).
>
> 9. In respect of ground 3 of the Appeal, the complaint that the Full Bench reached a conclusion about all up rates of pay in the absence of evidence is odd, considering the duty imposed on members of the Commission by s 19 of the Act and the fact that the conclusion is manifestly correct, but more importantly that this again has no relationship or relevance to s 29(1)(b)(ii).

77 The essence of the jurisdictional challenge raised the respondent, was:

> 10. In summary, the Appeal asserts that there has been an error in the interpretation of s 29(1)(b)(ii) but nothing in the grounds of appeal even vaguely relates to such an assertion.

78 Confronted with that basal difficulty, counsel for Ms Landsheer during oral argument, sought to find some belated assistance in from an earlier decision of this court in ***Matthews v Cool or Cosy Pty Ltd*** [2004] WASCA 114 (Steytler, Pullin & EM Heenan JJ), where an appeal had been successfully advanced in the Industrial Appeal Court, pursuant to s 90(1)(b). However, as was manifest in ***Matthews***, the argument had been about an error in the interpretation by the Full Bench of s 23, s 23A and s 29 of the IR Act. It was argued the error had inhibited recourse by that appellant to advancing

a contractual benefit claim, on a basis of being denied reasonable notice of the termination of his employment. Accordingly, an error of law in relation to the construction of or the interpretation of the provisions of an Act (for the purposes of meeting s 90(2)(b)) was demonstrably shown in ***Matthews***. Steytler J observed at [30]:

> Consequently, in my respectful opinion, what should have been done in this case is that the Full Bench should first have dealt with the claim in respect of the denial of a contractual benefit, in the form of reasonable notice, then having done so, gone on to consider what, if any, compensation should be ordered under s 23A(1)(ba). Because it failed to deal with the former claim, the appeal should be allowed and the orders made by the Full Bench set aside.

79 I note as well, observations of Pullin J at [43], [44] and [56]. His Honour concluded:

> The Full Bench implicitly assumed it had no jurisdiction to award damages in relation to the claim under s 29(1)9b)(ii), and it thereby erred in law in its interpretation of the Act …

80 And, as well, see EM Heenan J at [63], [67] and [73].

81 ***Matthews*** manifested a ground that was ultimately accepted as showing a constructional error of law by the Full Bench, in failing to recognise the extent of its jurisdiction to grant the relief sought by the appellant. The Full Bench's error arose by a misinterpretation of the underlying statutory provisions of the Act which, correctly construed, did not inhibit the contractual benefit claim being advanced under s 29(1)(b)(ii), in that matter.

82 Plainly then, upon the presenting facts of ***Matthews*** a decision of the Full Bench which was erroneous in law by reference to a misinterpretation of provisions within the IR Act, was made out.

Jurisdictional determination

83 The jurisdictional objection pressed by this respondent is correctly raised. The reasons of the Full Bench disclose no erroneous construction or interpretation of s 29(1)(b)(ii). Rather, what manifests is merely an orthodox application of established legal principle to the underlying factual circumstances as raised by Ms Landsheer's contractual benefit claim, seeking payment for additional hours worked. What unfolded before the Full Bench, essentially, saw an application of uncontroversial contractual law principles to the particular presenting facts before the Industrial Commissioner and then before the Full Bench.

84 Jurisdictional constraints inhibiting appeals to this court under s 90(1), do not allow a wholesale reventilation of what are, in essence, arguments of fact over the underlying circumstances of an individual claim. It is necessary for a would-be appellant to go further, to show an error of law in meeting the criteria of s 90(1)(a), (b) or (c) - and on no other ground.

85 In the present matter, the arguments of Ms Landsheer are said to be directed at the meaning of s 90(1)(b), but under scrutiny, can be seen only to advance her particular entitlements to a contractual benefit. Such arguments are not in truth, directed at the required identification of an error in the interpretation of legislation, or of an industrial instrument. They do not satisfy the jurisdictional standard of s 90(1)(b).

86 There is no worthwhile parallel here to the issues that presented in ***Matthews***. The arguments Ms Landsheer would seek to advance under her three proposed grounds of appeal to this court, do not at any level meet the required jurisdictional threshold of showing error of law by the Full Bench in the construction or interpretation of a statutory provision.

87 Accordingly, the respondent's motion to dismiss for want of jurisdiction must be allowed.

88 Orders in this court should issue in terms of the respondent's motion of 7 March 2014 dismissing this appeal for want of jurisdiction.

2014 WAIRC 01174

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 10 OF 2013

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	JOHANNA LANDSHEER
	APPELLANT
	-v-
	MORRIS CORPORATION (WA) PTY LTD
	RESPONDENT
CORAM	THE HONOURABLE JUSTICE BUSS
	THE HONOURABLE JUSTICE LE MIERE
	THE HONOURABLE JUTSICE KENNETH MARTIN
DATE	MONDAY, 20 OCTOBER 2014
FILE NO/S	IAC 1 OF 2014
CITATION NO.	2014 WAIRC 01174

Result	Respondent's Notice of Motion to Dismiss upheld; Appeal dismissed for want of jurisdiction
Representation	
Appellant	Mr T. Hammond (Counsel)
Respondent	Mr A. Cameron (Agent)

Order

It is hereby Ordered that:

1. The Respondent's Notice of Motion to dismiss the appeal is upheld; and
2. The appeal is dismissed for want of jurisdiction.

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

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 01192

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NOS. B 41 OF 2013 AND B 40 OF 2013 GIVEN ON 10 FEBRUARY 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2014 WAIRC 01192
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 10 JUNE 2014
DELIVERED	**:**	WEDNESDAY, 22 OCTOBER 2014
FILE NO.	**:**	FBA 3 OF 2014, FBA 4 OF 2014
BETWEEN	**:**	QANTAS AIRWAYS LIMITED (ACN 009 661 901) Appellant AND HELEN MARIE JOYCE; NATALIE LEANNE GARTSIDE Respondents

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**[2013] WAIRC 01083; (2014) 94 WAIG 120**
File No	**:**	**B 41 of 2013** **B 40 of 2013**

CatchWords	**:**	Industrial Law (WA) – Appeal against decision of the Commission – Claims of denied contractual benefits – Employees claim it is a condition of employment that job share arrangements are permanent and ongoing – Employer claims the term of the job-share arrangements are fixed – Turns on own facts – No term as to the duration of the job-share arrangements was agreed – Whether it was open to imply a term based on custom and practice in each of the employees' contracts of employment that the job-share arrangements were ongoing, considered – Whether the terms of 2004 contracts remained on foot after the job-share arrangements were entered into in 2008 considered – Termination of job-share arrangements could be effected by unilateral notice given by the employer pursuant to Hours of Duty clause in 2004 contracts – No effective notice had been given
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7, s 29(1)(b)(ii), s 49 *Workplace Relations Act 1996* (Cth) s 89A, s 170LW]

Result	:	Appeals allowed – Orders made – Decisions quashed
Representation:		
Counsel:		
Appellant	:	Mr H J Dixon SC of counsel and with him, Mr R L Hooker of counsel
Respondents	:	Mr S A Millman of counsel
Solicitors:		
Appellant	:	Ashurst Australia
Respondents	:	Slater & Gordon Lawyers

Case(s) referred to in reasons:

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

AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq) and Others [2006] HCA 13; (2006) 225 CLR 331

Australian Municipal, Administrative, Clerical and Services Union v Qantas Airways Limited [1999] AIRC 1416; [Print S1745]

Belo Fisheries v Froggett (1983) 63 WAIG 2394

B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings [1977] HCA 40; (1977) 180 CLR 266

Breen v Williams [1996] HCA 57; (1996) 186 CLR 71

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

Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Con-Stan Industries of Australia Proprietary Limited v Norwich Winterthur Insurance (Australia) Limited [1986] HCA 14; (1986) 160 CLR 226

Director General, Department of Education v United Voice WA [2013] WASCA 287; (2014) 94 WAIG 1

Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523

FW Farnsworth Limited v Lacy [2012] EWHC 2830(Ch)

Gartside and Joyce v Mr David Gloster, Head of Airports – Western Australia Qantas Airways [2013] WAIRC 01083; (2014) 94 WAIG 120

Health Services Union of Western Australia (Union of Workers) v Director General of Health [2008] WAIRC 00215; (2008) 88 WAIG 543

Hotcopper Australia Limited v Saab (2001) 81 WAIG 2704

Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] EWCA Civ 397

Landsheer v Morris Corporation (WA) Pty Ltd [2014] WAIRC 00034; (2014) 94 WAIG 37

Liverpool City Council v Irwin [1997] AC 239

Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd (1973) 129 CLR 48; (1973) 47 ALJR 326; (1973) 1 ALR 1

McCourt v Cranston [2012] WASCA 60 [20]

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451 [22]

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

Qantas Airways Ltd v Australian Municipal, Administrative, Clerical and Services Union [2000] AIRC 290; [Print T0301]

Rust v Abbey Life Assurance Co Ltd [1979] 2 Lloyd's Rep 334

Solectron Scotland Ltd v Roper [2003] UKEAT 0305_03_3107; [2004] IRLR 4

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165 [140]

Waroona Contracting v Usher (1984) 64 WAIG 1500

Case(s) also cited:

Cohen v iSOFT Group Pty Limited [2013] FCAFC 49

The State School Teachers' Union of W.A. (Incorporated) v Ken Davis (2012) 92 WAIG 1870

Haley v Public Transport Corporation (1998) 119 IR 242

Heimann v The Commonwealth (1938) 28 SR (NSW) 691, 695

McCasker v Darling Downs Co-op (1988) 25 IR 107

McClelland v Northern Ireland General Health Services Board [1957] 2 All ER 129

New South Wales Cancer Council v Sarfaty 1992) 28 NSWLR 68

Rankin v Marine Power International Pty Ltd (2001) 107 IR 117

Saldanha v Fujitsu Australia Pty Ltd (2008) 179 IR 259

Waddell v Mathematics.com.au Pty Ltd [2013] NSWSC 142

Reasons for Decision

The Appeals

SMITH AP:

Introduction

1 These appeals are instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against decisions made by the Commission on 10 February 2014 in B 40 and B 41 of 2013: [2013] WAIRC 01083; (2014) 94 WAIG 120. The applicant in B 40 of 2013 Natalie Leanne Gartside, and the applicant in B 41 of 2013, Helen Marie Joyce, made applications referring an industrial matter to the Commission under s 29(1)(b)(ii) of the Act. The applications were heard together. Ms Gartside and Ms Joyce each claimed that they had been denied a benefit due to them under their respective contracts of employment by their employer, Qantas Airways Limited (Qantas Airways).

2 Both Ms Gartside and Ms Joyce entered into arrangements to job share a full-time position as a customer service agent at Level 3 at Perth Airport. They began these arrangements in February 2008. At all material times:

(a) Ms Gartside and Ms Joyce claimed that the job share arrangements were permanent and ongoing;

(b) Ms Gartside and Ms Joyce together with their agent the Australian Services Union (the ASU) were in dispute with Qantas Airways about whether these arrangements were permanent and ongoing; and

(c) Qantas Airways said the term of each of the job-share arrangements were fixed and on secondment.

3 On 3 December 2012, Qantas Airways invited Ms Gartside and Ms Joyce to re-apply for a job-share secondment, as it contended the existing job-share arrangements were due to expire in February 2013.

4 After hearing evidence and submissions about the matter, the Commission made declarations and orders that it was a term of the current contracts of employment of Ms Gartside and Ms Joyce that they were employed in job-share positions on an ongoing basis and ordered Qantas Airways to continue to employ Ms Gartside and Ms Joyce in their job-share positions on this basis: FBA 3 of 2014 [2014] WAIRC 00087; (2014) 94 WAIG 128; FBA 4 of 2014 [2014] WAIRC 00086; (2014) 94 WAIG 127.

Material facts and supporting documents

5 Central to the claims of each employee that the job-share positions they held were permanent and ongoing, is an agreement entered into by the ASU and Qantas Airways on 19 August 1996 (Heads of Agreement): tab 17, AB 148. In that document, the ASU and Qantas Airways set out the basis upon which job-share positions were to be made available as follows:

> **PREAMBLE**
>
> It has been agreed that on an as needs basis, positions are available to be shared under this job share agreement.
>
> **GENERAL PRINCIPLES**
>
> It is recognised that in some instances current serving staff will, due to changed circumstances, find their full time hours impossible to meet. In those circumstances the staff member may elect to share a full time job with another job sharer. This job share arrangement will be facilitated by Qantas in instances where efficiency/cost is not compromised.
>
> It should be noted that job share is not a substitute for part time employment but has been created to provide more flexible employment arrangements where an existing staff member's circumstances have changed.
>
> Each job sharer will be on an individual contract sharing a <u>fulltime</u> position. Should the job sharer's partner leave or permanently change their hours the Company will assist the job sharer to find a new partner.
>
> If the vacant job share position cannot be filled, then the position will revert back to a full time position and the job share person will be required to work full time hours.
>
> **TERMS AND CONDITIONS**
>
> **Hours of Duty**
>
> The full time position's hours will be shared between the two job sharers by their agreement.
>
> Rostered hours will not exceed 76 per fortnight collectively. No twentieth days will apply to job sharers.
>
> **Workday Swaps**
>
> Job Share partners will decide amongst themselves as to which days they will work. The supervisor is to be notified of which job sharer is working on each rostered shift.
>
> **Overtime**
>
> Any time worked in excess of 7.6 hours per day will be overtime and paid at overtime rates.
>
> Between the two job share partners no more than 10 days per fortnight shall be rostered on single time.
>
> It should be noted that in general there is no intention to have a job sharer work at the same time as that of their job share partner, i.e. cover operational demands. However should a job sharer chose [sic] to work in excess of their rostered hours and combined with their rostered shifts, hours do not exceed 76 per fortnight then these will be paid at single time rates.

Salary

The salary rate will be pro rated in accordance with the number of hours worked at the appropriate Award classification.

Annual Leave

Annual Leave will accrue on the basis of actual ordinary hours worked. Leave entitlements will be based on an average of hours worked for the past year. The hours will accumulate until the employee's anniversary at which time the total hours will be divided by 52 to reach the average weekly hours. These hours will then be multiplied to arrive at the entitlement.

To facilitate annual leave relief, job share employees can bid for annual leave lines (as standard practice now for full time employees). Further they are required to relieve their job share partner at single time rates whilst the other is on annual leave.

Long Service Leave

Long service leave payment will also be pro rated. Staff remain entitled to 13 weeks long service leave for 10 years' employment. However, the payment will be pro rated. Average hours worked over the year will be calculated as a percentage of full time hours. Each year's average will then be divided by the number of years of service to give an average percentage over the length of service. When the employee goes on long service leave, this percentage will then be multiplied by the then current salary to arrive at the wage applicable over the leave period.

Sick Leave

The sick leave entitlement will be calculated on a pro-rata basis by applying the percentage of full time hours actually worked by the job share officer to the full time sick leave entitlement.

Changing from Full Time to Job Share and Vice Versa.

No restrictions will apply subject to efficiency/cost not being compromised.

Replacement Staff - Maternity Leave

Where a staff member who is in a job share arrangement proceeds on maternity leave and a replacement is able to be found that still fulfils the job share employment arrangement, then this replacement will be on a temporary basis and the staff member on maternity leave will be entitled to return to their job share arrangement at the conclusion of their maternity leave.

Days in Lieu

For shift working job share arrangements, each job sharer will accrue 3.8 hours for each day their roster line has them both rostered off. Please note in accordance with the Airline Officers Award days in lieu can only be taken by mutual agreement. In order to comply with this provision should a job share partner cover the absence of a job share partner on a day in lieu then this will be paid at single time.

Other Matters

In any matter not covered, the Airline Officers (Qantas Airways Ltd) Award 1992 and Company Policy shall apply.

6 Ms Patricia Branson is an Assistant Branch Secretary of the ASU. She has had direct involvement with Qantas Airways at Perth Airport on behalf of the ASU since August 2007. She gave evidence that during negotiations about job-share arrangements at Perth Airport, no agreement was reached between the parties about the job-share roles being for a fixed term. Ms Branson claimed when giving evidence that no agreement between the ASU and Qantas Airways was reached during the negotiations at Perth Airport to change or amend the principles contained in the Heads of Agreement.

7 Ms Linda White is the Assistant National Secretary of the ASU. She has been in this role since 1995. She gave evidence that the Heads of Agreement contain the general principles governing job-share arrangements throughout Australia, and its terms form the basis for negotiation of local agreements for job sharing. Ms White's evidence was that:

(a) in 2007, approximately 170 Qantas Airways employees were engaged in job-share positions around Australia and they were all ongoing, permanent arrangements; and

(b) during negotiations for a local job-share agreement at Perth Airport, the ASU's position was that all positions would be ongoing, which was the situation that also applied in late-2007 at Perth Airport.

8 Ms White was unaware of any job-share positions at Qantas throughout Australia which were not ongoing. She however conceded that some employees may job share on fixed terms, but she did not know about them: ts 136. Ms White also stated when giving evidence that many local area agreements included enhanced conditions over and above the conditions included in the Heads of Agreement.

9 It is common ground that Ms Gartside and Ms Joyce are employed by Qantas Airways under written contracts of employment. Ms Gartside commenced employment on 22 September 2003 and signed a written contract of employment on 25 January 2004. Ms Joyce commenced employment on 9 June 2004 and signed a written contract of employment on 19 December 2004: [1] - [2] agreed statement of facts, AB 125. Each of those written contracts of employment provided for employment on a permanent part-time basis as a Customer Services Agent: [3] agreed statement of facts, tab 14 and tab 15, AB 122 - 137. The material terms of each contract of employment of Ms Gartside and Ms Joyce are the same. In the second paragraph of each contract it stated 'The terms and conditions contained in this letter take effect from your date of permanent appointment … The terms and conditions set out in this letter continue to apply to any other positions you may hold with Qantas unless otherwise amended in writing'.

10 Of particular importance are the words that are set out under the heading 'PART-TIME CONDITIONS' in each contract as follows:

> **Hours of Duty**
>
> Initially, your rostered hours and pattern of work will be a minimum of 20 and a maximum of 30 hours per week covering a 7 day, 24 hour rotational roster. This is based on current operational requirements. If these operational requirements vary in the future, any changes to your pattern of work will be advised to you in writing with a minimum of 7 days' notice. This will be discussed with you.
>
> Ordinary hours will not exceed 76 hours per fortnight.
>
> **Extension of Shift**
>
> To satisfy operational/commercial requirements on the day, part-time employees may have their rostered shift hours extended up to a maximum of 7.6 hours by mutual agreement. Such extension will be known as shift extension, not overtime and will be paid at single time.
>
> **Overtime**
>
> Any time worked in excess of 7.6 hours per day or 10 days per fortnight will be overtime and paid at overtime rates.
>
> (tab 14, AB 128-129; tab 15, AB 136-137)

11 Each contract of employment also contains a clause titled 'CORPORATE POLICIES' which provides as follows:

> You are required to comply with Qantas policies and procedures as determined or varied by Qantas from time to time. Any breach of these policies and procedures may result in you being disciplined and, where appropriate, dismissed. A copy of the Qantas Policy Manual is available from your Human Resources Manager, or Manager upon request or can be accessed through the Qantas Intranet Site. In addition, a copy of the current Standards and Conduct Policies and the IT Usage Policy are attached. It is your responsibility to keep up to date and seek information regarding Qantas policies and procedures.
>
> (tab 14, AB 125; tab 15, AB 133)

12 After the Heads of Agreement was entered into and before Ms Gartside and Ms Joyce entered into job-share arrangements at Perth Airport, Qantas Airways and the ASU entered into local job-share arrangements at Melbourne Airport on 31 October 2002 and Brisbane Airport effective from September 2004: tab 9, AB 55-64.

13 On 22 August 2007 Ms Gartside and Ms Joyce, along with eight other employees, submitted a letter addressed to Brigitte Ridout, the Customer Services Operations Manager of Qantas Airways at Perth Domestic Airport, containing a written request to Qantas Airways requesting job-share arrangements, in which they set out a number of issues they had with their current working arrangements: [4] agreed statement of facts, tab 7, AB 25.

14 The employees stated in their request that a perusal of part-time and full-time rosters revealed a vast difference between full-time and part-time shifts, whereby full-time employees worked mostly day shifts four days a week with three days off, whilst part-time employees worked five days a week with shifts averaging six or more hours due to extensions occurring regularly. They complained about day off patterns being irregular, with only four weekends off in 18 weeks and inadequate recovery between shifts, resulting in fatigue and absenteeism. They also said that the part-time rosters did not seem to follow the forward rotation guidelines recommended by health professionals and roster experts of morning/afternoon/night rotation; and that part-time staff continually had late finishes with short turnaround times, with hours per week worked on average 28 hours: tab 21, AB 299.

15 Qantas Airways agreed to the request to create a number of job-share positions at Perth Airport. On 12 September 2007, Qantas Airways issued a notice inviting expressions of interest from within Perth Airport for the position of Customer Service Agent (Job Share) (Level 3) within the Customer Services Division. The closing date for submissions was 26 September 2007. On 14 and 16 September 2007 respectively, Ms Gartside and Ms Joyce each submitted an individual expression of interest in response to the notice. Then on 27 September 2007, Ms Gartside and Ms Joyce submitted a joint written proposal to share a job-share position. On 22 October 2007, Qantas Airways advised Ms Ridout that approvals had been granted for staff in the Customer Services discussions for a number of additional job-share roles: tab 28, AB 313.

16 From about November 2007, representatives of Qantas Airlines and the ASU were involved in discussions and meetings with the intention of negotiating the terms of a local job-share agreement for customer service employees at Perth Airport. As ASU delegates, Ms Gartside and Ms Joyce were involved in the negotiations. It is clear from the evidence given by the witnesses and from the matters pleaded in the statement of agreed facts that the ASU acted as agents for Ms Gartside and Ms Joyce in negotiating the terms of the job-share arrangements. The ASU's position was that all job-share positions at Perth Airport were permanent, ongoing positions. Qantas Airways, however, was only prepared to offer job-share arrangements at Perth Airport as fixed-term secondments from employees' substantive roles.

17 In a letter from the ASU dated 14 January 2008, to Curtis Davies, the Executive General Manager – Services of Qantas Airways, it is recorded that at a meeting on 24 October 2007 between ASU representatives, (including ASU delegates), and Qantas Airlines, Qantas Airlines made an offer of a two year secondment: tab 33, AB 328. However, sometime in or around January 2008 Qantas Airlines extended the term to a period of five years.

18 In a DRAFT FOR DISCUSSION – Without Prejudice Version 14 document entitled JOB SHARE PROPOSAL PERTH AIRPORT (Version 14), Qantas Airways put forward the terms of a local job-share arrangement which it intended would apply to all job-share positions entered into at Perth Airport: tab 32, AB 321-327. Under the heading 'GENERAL PRINCIPLES', Version 14 stated as follows:

It is recognised that in some circumstances job share is one method of assisting staff balance their work and personal commitments, while also assisting Qantas retain trained and experienced staff.

Job share is not a substitute for part time employment, but is an arrangement where two employees share an existing full time position. Job Share is understood to be cost neutral to Qantas.

Application to share a full time position is open to all permanent employees.

Job share opportunities will be provided on a fixed term secondment basis in order to accommodate as many staff as possible. The period of the fixed term job share will be determined having regard to operational requirements and following consultation with affected employees. At the conclusion of the fixed term the status of the job share arrangement will be reviewed considering the business operational needs.

In recognition of the particular circumstances of the negotiations at Perth Airport, it is proposed on this occasion to fix the job share term at 5 years, or subject to employee agreement, some lesser period[.]

These terms and conditions will apply to any new job share arrangements entered into from DATE[.]

19 In respect of hours of duty and overtime, the job-share proposal in Version 14 proposed as follows:

Hours of Duty

The hours of duty for the full time position will be shared by agreement between the two job sharers. A system of handover, if applicable to the role, must be agreed between the parties to ensure a smooth transition for our customers.

In general, each jobsharer will work up to 38 hours per fortnight. Shift length will be in accordance with the pattern of work rostered in the workplace. The minimum daily engagement will be 8 hours as relevant, unless all parties agree that the position to be shared can be efficiently undertaken with a 4 hour minimum daily engagement.

The rostered hours of the two job sharers combined will not exceed 76 per fortnight, or 10 days per fortnight.

Job share partners will decide amongst themselves which days they will work from a published roster full time line given to them. These days are fixed for the term of the job share and published roster pattern unless prior negotiation and agreement has been concluded with the Management team and job sharers. It is understood rosters possibly will change at least six monthly subject to the seasonal flying schedule changes. Job-share partners will notify the resources department twenty eight(28) days in advance, provided that shift changes between the partners can be notified up to forty-eight (48) hours in advance of the rostered shift.

The method of working ordinary hours will be included in the letter confirming the job share arrangement. Acceptance of this arrangement by the job sharer will constitute agreement under the applicable industrial instrument, method of arranging ordinary hours.

20th days will not apply to job sharers.

Overtime

A job sharer will not ordinarily be required to work overtime.

All time worked in excess of 10 days per fortnight or over 38 hours per week dependant on the shift length and pattern worked, shall be overtime paid at overtime rates specified in the relevant award.

There is no intention to have a job-sharer work at the same time as their job-share partner however with the agreement of parties this may occur if operationally required.

(tab 32, AB 323-324)

20 Although this document is not dated, the evidence given by Ms Joyce was that Version 14 was provided to the ASU on or about 21 December 2007: ts 47.

21 Throughout January 2008, the ASU and Qantas Airlines remained in dispute about the terms of the job-share arrangements. Sometime in January 2008, Qantas Airways issued an internal vacancy notice inviting applications from customer service employees at Perth Airport for the position of Customer Service Agent (Job-Share) Level 3 within the Customer Service Division. The closing date for applications was 23 January 2008. In an email to Ms Branson from Alex Howieson on behalf of Qantas Airways it was stated that it was the intention of Qantas Airlines to offer 10 lines of job-share for three months so the partners can trial each other with the possibility of extending this time period: tab 34, AB 331. On 30 January 2008, Ms Branson sent a letter to Ms N Chirico at Qantas Airways Perth Airport, in which she stated that their members were prepared to act in the job-share positions as they were given to understand in October 2007 were rightfully theirs, and that they are prepared to do this while the 'matters in dispute, that is the term of the positions and others, is negotiated and agreed by the parties': tab 35, AB 333.

22 On 1 February 2008, HR representatives of Qantas Airlines had separate discussions with Ms Gartside and Ms Joyce about the proposed job-share arrangements: [18] agreed statement of facts, tab 7, AB 26.

23 On 7 February 2008, Qantas Airways advised the ASU in writing that:

(a) if the six-month trial was successful, Ms Gartside and Ms Joyce (among others) would be offered a job-share role at Perth Airport for a further four and a half years; and

(b) the terms of the job-sharing arrangements would be those contained in Version 14, which would be applied as a matter of policy pending any subsequent agreement that may be reached with the ASU: [19] agreed statement of facts, tab 7, AB 26.

24 On 8 February 2008, the ASU advised Qantas Airways in writing that its members would commence to act in job-share positions from 13 February 2008 for a six month trial with an expectation to continue: [20] agreed statement of facts, tab 7, AB 26.

25 Ms Gartside and Ms Joyce commenced working in job-share in the week commencing 20 February 2008. They both worked 19 hours per week: ts 54.

26 On 20 May 2008, Qantas Airways set out what it said were terms and conditions of the trial job-share arrangements in letters sent to Ms Gartside and Ms Joyce. Both letters contained a signatory clause for each employee to sign and return the letter to Qantas Airways. Each letter was titled 'Confirmation of Secondment to a Temporary Job Share Position'. The letters were identical. The first two paragraphs of each letter stated:

> This confirms your temporary transfer to a job share position on a trial basis for six months, with a view it (sic) being extended for a further period, dependant on agreement with the ASU in regard to the 'Perth Airport Jobshare Agreement' (v13 attached).
>
> The terms and conditions of your transfer to the above position are set out below. The terms and conditions set out in this letter replace all prior written and oral representations made to you and discussions with you about your employment. The terms and conditions set out in this letter continue to apply to any other positions you may hold with Qantas unless otherwise amended in writing. We ask that you read these carefully. At the end of this letter we seek your acknowledgment that you have read, understood and accepted these terms and conditions.

27 Each letter contained comprehensive statements of duties and responsibilities, and entitlements such as salary, superannuation, annual leave and other matters. It was stated in the letters that the commencement date was 20 February 2008 and the term of the agreement was six months from that date, being 19 August 2008. It was also stated in the letters that '[s]hould an agreement not be reached with the ASU by that time, you will return to your substantive position held prior to the job share trial commencement date' (tab 40, AB 352). However, neither Ms Gartside nor Ms Joyce signed these letters and nor does it appear that the terms set out in the letters were implemented by Qantas Airways.

28 Ms Joyce gave uncontradicted evidence that the terms set out in the letters differed from the terms and conditions that applied to her work from the time she commenced the job-share arrangement on 20 February 2008. In particular, she said in the following exchange:

> **HARRISON C:** What's it different to? I didn't quite hear Mr Upham?---The terms and conditions, Commissioner.
>
> Well, different to what terms and conditions? What are you comparing them to?---From what I was actually working.
>
> But if you were working prior to this as permanent part time - - -?---Yes, Commissioner, I was. When I commenced as a part-timer with Qantas, I worked a minimum of 20 hours. That was my contract. My contract that I was working under from 20 February 2008 was 19 hours. My conditions of my job share contract that I was working was not having to cover my job share partner when they took a day in lieu, day off.
>
> Well, I understood you to say that this - you were comparing what's in here with your permanent part time conditions of employment, but you've just mentioned the job share arrangement?---No, what I was saying was that I was - when I received this document on 20 May - - -
>
> Yes?--- - - - it different to how I was working job share from 20 February.
>
> All right. Well, how did you know what your terms and conditions were as at 20 February?---This is in retrospect, basically. When I received this trial document on 20 May, it differed from what I had been working on the 20th - from 20 February.
>
> Well, how did you know what you were working from 20 February?---From me going to work every day and working those conditions as a job sharer.
>
> And when you say this is different - - -?---Yes.
>
> - - - so your conditions changed as at 20 May 2008, from when you commenced in February 2008?---No, I continued with the same conditions, but what was stated in this document is different to what I was working. So when I was handed this document on 20 May, this differs from how I was working as a job sharer from 20 February. Can I give you an example?
>
> Well, I'm still a bit confused. When - that was by custom and practice, your conditions were?---Yes.
>
> How did you know - when you started work as a job sharer, how did you know how many hours you were working, what you were supposed to do if your - the person you were sharing with wasn't available?---When we had some information gathering sessions, we were basically told that we who our partner was and how the job share operated in the port at the time.
>
> And who told you that?---It was our conversations with Nicolai Chirico, who was our HR Manager at the time.
>
> And was anything reduced to writing?---No.
>
> So when you commenced working as a job sharer, if you weren't clear on how things were going to work, what did you do?---I would ask my HR Manager.
>
> Who was?---Nicolai Chirico.
>
> All right. And so you commenced working as - under the job share arrangement, and in February, being May, what was contained in this was different to the custom and practice that you'd been working since February?---Yes, Commissioner.
>
> All right, thank you. Yes, Mr Upham.

UPHAM, MR: Thank you, Commissioner. I think on that point, it also did - once you were given this document, did anything change in the way you operated?---Nothing changed.

Thank you.

HARRISON C: I thought you just told me that things had changed?---No, this document stated that it would change.

What do you mean?---In this document, Commissioner, of 20 May, there was terms and conditions that were in conflict to how I was working.

Yes?---And those conditions, those different conditions were in this document, it states that I need to cover my job share partner when they went on a day off in lieu. So I would have to come in on a day that I wasn't working and work for her.

All right. Well, what happened between February and May if either of your - you or your job share partner took a day off?---We took a day off and the other partner did not have to cover.

All right. Was there any other difference?---If I worked anything over my 19 hours of what I was working, I would be paid double time. And that is in conflict to this document. This document states that I would have to work more - I would have to work 38 hours before I got - in that week before I got overtime.

Anything else?---Sick leave was, at the time of me or my partner going on sick leave, there was no condition placed upon each of us that we had to cover each other for sick leave. And in this document, it states that in the first instance that we had to check with our job share partner to see whether we would cover each other on sick leave.

All right. Now, you were given this memorandum, what happened to it?---Nothing happened with it, Commissioner.

You didn't sign it?---I didn't sign it.

(ts 53 - 55)

29 Ms Gartside also made a general statement in her evidence that she did not perform work in accordance with the terms specified in the letters dated 20 May 2008: ts 102-103.

30 Prior to Ms Gartside and Ms Joyce receiving the letter dated 20 May 2008, the ASU met with the management of Qantas Airways on 23 April 2008. Ms Gartside was present at that meeting as a delegate, but Ms Joyce was not. At that meeting, job-share arrangements were discussed. It is recorded in the minutes of that meeting that 'staff who have been successful in obtaining job share positions will receive contracts as soon as the JS agreement has been signed off by the ASU and Qantas IR department.' There was also a discussion about overtime and a statement that job-sharers would not be ordinarily be required to work overtime: tab 41, AB 362.

31 On 16 June 2008, Ms White sent an email to Mr Howieson on behalf of the ASU members who had entered into the job-share arrangements stating that the letters (dated 20 May 2008) attached Version 13 which 'we do not agree to': tab 42, AB 369. Mr Howieson replied by an email. From the text of the response from Mr Howieson, it can be inferred that all that had been agreed at that time was the six month trial and discussions about the five year term were continuing: tab 42, AB 368.

32 On 30 June 2008, the ASU wrote to Qantas Airways by email, disagreeing with Qantas Airways' position: [23] agreed statement of facts, tab 7, AB 26.

33 On 11 September 2008, the ASU and delegates including Ms Joyce, but not Ms Gartside, met with Mr Chris FitzGerald and other managers of Qantas Airways. Minutes of the meeting record that Mr FitzGerald was continuing to have discussions with Corporate IR to obtain approval. The notes record Mr FitzGerald as 'CF' stated:

> CF advised that following his meeting with delegates and Gerald from the ASU last week he has a telelink up with Peter Smith from Corporate IR Friday, 12 September 2008 to get approval to now use the Melbourne Job-Share Agreement which is used in all other ports instead of going over Version 13. CF also advised that he will be seeking final approval to use wording in our agreement to reflect a review process after the 5 year term. HJ asked if Peter Smith is aware of the actual wording that Perth is seeking. CF confirmed that Peter Smith is, and that Perth management and the ASU's position is that if the partners still require job-share after the 5 year period they will continue for a further 5 years or lesser period and then reviewed again perhaps 2 yearly. CF informed the meeting that he has not heard anything negative in relation to Perth's request but is waiting to hear how the wording of the review will be from IR's perspective. CF advised that he will contact Gerald from the ASU as soon as he has finished the telelinkup to advise the outcome. CF advised that Perth management and the Perth ASU office are pushing Corporate IR to get Perth's job-share permanent percentage up to the national level of 10% instead of 2.5% before any fixed term contracts are introduced. CF advised that the ASU want parity with the eastern seaboard ports in regard to a national standard and he cannot see why not.

(tab 43, AB 373)

34 Although these notes indicate that negotiations were ongoing, it seems no further discussions took place between the ASU and Qantas Airways, or between Ms Gartside and Ms Joyce and Qantas Airways about the duration of the job-share arrangements of Ms Gartside and Ms Joyce after 11 September 2008.

35 It is common ground that a local agreement was not reached for job-share arrangements and that Ms Gartside and Ms Joyce continued to work in the job-share arrangements. Nor was there any attempt by Qantas Airways to bring the job-share arrangements to an end.

36 On 23 April 2009, Qantas Airways advised the ASU in writing that:

(a) as Qantas Airways could not agree to the ASU's demand that it fill the limited job lines available on a permanent basis, Qantas Airways considered that its efforts to achieve a local job-share agreement with the ASU at Perth Airport were unsuccessful; and

(b) the terms and conditions of the job-sharing arrangements for employees who participated in the trial would continue to be those contained in Version 14 which would henceforth be applied as a matter of policy as 'the job-share arrangement': [24] agreed statement of facts, tab 7, AB 26.

37 On 24 April 2009, the ASU responded to Qantas Airways seeking further discussion before implementation of the Version 14 agreement: [24] – [25] agreed statement of facts, tab 7, AB 26.

38 On 5 June 2009, Qantas Airways sent letters to Ms Gartside and Ms Joyce stating it regarded the job-share arrangement at Perth Airport to be finalised and 'confirmed' a job-share end date of 19 February 2013. In Ms Gartside's letter, Mr Chris FitzGerald, the Customer Service Manager, Qantas Airways, stated as follows:

> As a participant in this trial, we now wish to advise you that the Job Share Arrangement has been finalised and is attached for your reference.
>
> Your current Job Share position shall continue under the terms of this Arrangement as follows:
>
> Job Share Start Date 20 February 2008
>
> Job Share End Date 19 February 2013
>
> Job Share Partner Natalie Gartside
>
> As per the current practice, you and your partner as outlined above, shall continue to nominate the days to be worked each pay period by using the Job Share Roster Advice form.
>
> As outlined in the Arrangement, we will contact you 3 months prior to the expiry date above to discuss your Job Share position and if suitable a further extension of the Arrangement.
>
> (tab 44, AB 377)

39 On 10 June 2009, Ms Gartside and Ms Joyce sent a joint email to Mr FitzGerald in which they stated they rejected the 'new conditions' on the arrangements that had been in place since February 2008, in particular they rejected the condition that the job-share arrangements were for a fixed term: tab 45, AB 386 – 387.

40 On 18 June 2009, Ms Branson wrote to Qantas Airways on behalf of Ms Gartside and Ms Joyce and others, refuting Qantas Airways' position and suggesting further revision of the Version 14 agreement: [28] agreed statement of facts, tab 7, AB 27.

41 On 27 September 2011, Qantas Airways gave notice to Ms Gartside and Ms Joyce of a change from a fixed to a rotational roster to take effect from 2 November 2011 on grounds of significant change in the way it manages its operations: tab 46, AB 392, ts 65.

42 On 3 December 2012, Qantas Airways invited Ms Gartside and Ms Joyce to reapply for a job-share secondment before 31 December 2012, as their existing job-share secondment was 'due to expire on 19 February 2013': [29] agreed statement of facts, tab 7, AB 27. In a letter dated 3 December 2012, Mr Joel Taueber, Manager Customer Service, Perth Airport, Mr Taueber informed Ms Gartside and Ms Joyce:

> Your secondment to a fixed term job share arrangement is due to expire on 19 February 2013 at which time you will either transition to a new agreed flexible work arrangement or return to your substantive position of Part Time Level 3 Customer Service Agent.
>
> In accordance with the terms of the Perth Job Share Arrangement Policy we will shortly need to review your current fixed term job share arrangement at Perth Airport with you. This review will take into account:
>
> 1. Operational issues
> 2. The personal circumstances of employees seeking job share arrangements
> 3. The performance assessment of the employees concerned
> 4. Skills award level compatability [sic].
>
> Should you wish to request either:
>
> 1. an extension to your current temporary job share arrangement ;or [sic]
> 2. to be considered for another type of flexible work arrangement
>
> please submit your request in writing, including the details of the flexible work arrangement you are requesting be considered by the company and the reasons for request, no later than 31 December 2012. Please ensure you include all relevant supporting evidence (such as medical certificates, birth certificates, letters from childcare providers etc).
>
> Once we have your application in writing I will arrange for us to meet and discuss the operational and business requirements of Perth Airport and your flexible work request.
>
> Should we not hear from you by 31 December 2012 you will return to your substantive role of Part Time Level 3 Customer Service Agent on 20 February 2013.
>
> Please be aware the demand for flexible work arrangements is high within Perth Airport and whilst the Company is committed to supporting staff in managing work/life balance, where reasonable and practical for the individual and the business, in some circumstances it may not always be possible to facilitate requests due to operational or other business requirements.
>
> We encourage you to be open in discussing and considering a range of possible options. All arrangements need to comply with the requirements of any relevant Award Agreement or Policy already in place.
>
> (tab 47, AB 393-394)

43 After some discussion, the job-share arrangements of Ms Gartside and Ms Joyce were extended to 28 May 2013 and on 27 May 2013, Qantas Airways advised Ms Gartside and Ms Joyce that Qantas Airways could not offer a further job-share secondment after the expiry of the current secondment, but they would offer a three month transition period to allow Ms Gartside and Ms Joyce to transition back to their substantive position and roster: [35] agreed statement of facts, tab 7, AB 27. In letter dated 27 May 2013, Brooke Coffey, Acting Manager Customer Service, Perth Airport, informed Ms Gartside and Ms Joyce:

> Thank you for your letter and supporting documentation in response to Qantas' letter of 3 December 2012 regarding fixed term job share arrangements in Customer Services at Perth Airport.
>
> As previously advised, the demand for flexible work arrangements, including job share arrangements, is high within Perth Airport and Qantas is committed to supporting all staff in managing work/life balance by offering flexible work arrangements where operational and business requirements allow. However, Qantas can only accommodate a finite number of job share arrangements within Customer Services at Perth Airport.
>
> We have received a large number of applications from Qantas employees for a job share secondment, which exceed the number of job-share arrangements that can be accommodated within Customer Services at Perth Airport. Accordingly, we have had to balance the needs of individual employees based upon their personal circumstances, in determining the offers that can be made.
>
> We have carefully considered your letter and supporting documentation, and we acknowledge your current family circumstances upon which your desire for a job share arrangement is based.
>
> Unfortunately on this occasion, we are unable to offer you a further job share secondment after the expiry of your current job share secondment on 28 May 2013.
>
> You will therefore be required to return to your substantive part-time Customer Service Agent position (7 day rotating shifts) (**your Substantive Position**).
>
> However, we recognise that whilst Qantas has previously advised you that your current job share secondment expires on 28 May 2013, the transition from your current job share secondment to your Substantive Position is likely to require you and your family to make adjustments to your current arrangements.
>
> In support of this transition, we would like to offer you a period of three months on your current job share roster, to make the necessary preparations to return to your Substantive Position and roster (**3 Month Transition Period**). Should you not require the 3 Month Transition Period please advise me as soon as possible.
>
> Should you wish to accept the offer of the 3 Month Transition Period, your return to your Substantive Position and roster will commence on 28th August 2013. Your new roster will be forwarded to you once published.
>
> Should you wish to discuss alternative flexible work arrangements, such as roster options, please make an appointment with me to do so.
>
> We will keep both your letter and supporting documentation on file and we are happy to reconsider your situation when or if future job share opportunities at Perth Airport become available. Should your personal circumstances change, please advise me.
>
> Thank you once again for your time and interest.
>
> (tab 48, AB 395-396)

44 Qantas Airways subsequently further extended each of Ms Gartside and Ms Joyce's job-share arrangements until 1 October 2013: [36] agreed statement of facts, tab 7, AB 27.

45 Other documents of significance in these appeals are the contracts of employment for Ms Leslie Emmans dated on 12 August 1998 (exhibit 1.3, tab 16, AB 138-147), and Ms Toula Meakins dated on 7 May 2001: exhibit R1, tab 62, AB 443-452.

46 Ms Emmans' contract of employment expressly states that she was transferred from fixed hours part-time to full-time job-share. The terms and conditions of her job-share arrangement were set out under the heading 'General Principles' as follows:

> It is recognised that in some instances current serving staff will, due to changed circumstances, find their full-time hours impossible to meet. In those circumstances the staff member may elect to share a full-time job with another job sharer. This job share arrangement will be facilitated by Qantas in instances where efficiency/cost is not compromised.
>
> It should be noted that job share is not a substitute for part-time employment but has been created to provide more flexible employment arrangements where an existing staff members' circumstances have changed.
>
> Each job sharer will be on an individual contract sharing a full-time position. Should the job sharer's partner leave or permanently change their hours, the Company will assist the job sharer to find a new partner. If the vacant job share position cannot be filled, then the position will revert back to a full-time position and the job share person will be required to work full-time hours.
>
> (tab 16, AB 144)

47 Other relevant terms of Ms Emmans' contract of employment were set out:

(a) Under the heading of 'Hours of Duty', as follows:

> The full – time position's hours will be shared between two job sharers by their agreement. In general there will be a minimum engagement of 15.2 hours per week.

(tab 16, AB 145)

(b) Under the heading 'Overtime' as follows:

> As the two sharers are working in one full-time position, any time worked in excess of their rostered shift will be regarded as overtime and will be paid at overtime rates. Between the two job-sharers no more than 10 days per fortnight will be rostered on single time.
>
> It should be noted that in general there is no intention to have a Job-sharer work at the same time as that of their Job share partner. In such instances all full-timers or part-timers will have preference in the allocation of overtime.
>
> A Job-sharer will be paid at single time rates up to 36 hours per person per fortnight.

(tab 16, AB 145)

48 The relevant clauses of Ms Meakins' contract of employment, were set out in the memorandum dated 7 May 2001 as follows:

> It is recognised that in some instances current serving staff will, due to changed circumstances find their full time hours impossible to meet. In those circumstances the staff member may elect to share a full time job with another job sharer. This job share arrangement will be facilitated by Qantas in instances where there is mutual agreement and where efficiency/ cost is not compromised.
>
> It should be noted that job share is not a substitute for part time employment but has been created to provide more flexible employment arrangements where an existing staff members circumstances have changed.
>
> At all times, staff undertaking job share arrangements will return to their substantive positions should for any reason the job share terminate. Should one job sharer wish to cease job share arrangements and return to their substantive position and a replacement can be found via expressions of interest, the employee wishing to cease job share will be required to apply/ seek employment in a vacant substantive position.
>
> If a vacant job share position cannot be filled, then the position will revert back to the full time line and the remaining job sharer will be required to revert to their substantive position.
>
> Each job sharer will be on an individual job share agreement sharing a full time position. Should the job sharer leave or permanently change their hours the Company will assist the job sharer to find a new partner. Should this be delayed for whatever reason, the job sharer must work the full time hours in accordance with the Vacant Job Share Position and Absence Clauses.
>
> In general there is no intention to have a job sharer work at the same time as their partner, ie to cover operational demands.
>
> Job sharers can put their names down to apply for any other positions within the department at any time.
>
> Hours worked under a job share agreement by staff whose substantive positions are Part Time will not count towards Clause 39 Hours of Duty (C) of the Airline Officers (Qantas Airways Limited) Award 1995 or various enterprise agreements.
>
> This job share arrangement will be facilitated by Qantas in instances where efficiency/cost is not compromised.
>
> …
>
> **Overtime**
>
> Any time worked in excess of rostered hours per day will be paid at overtime rates.
>
> Between the two job share partners no more than ten (10) days per fortnight or 76 hours shall be worked. If more days are worked it will be at overtime rates.

(tab 62, AB 449 – 450)

49 Evidence was also given by two other employees of Qantas Airways who had commenced employment in job-share positions. However, their evidence is not relevant or material to the issues raised in these appeals. Qantas Airways elected to not call any witnesses to give evidence.

The Commission's reasons for decision at first instance

50 In her reasons for decision, the Commissioner set out the basis of the claim made by Ms Gartside and Ms Joyce as follows:

(a) Ms Gartside and Ms Joyce rely upon a Heads of Agreement dated 19 August 1996 made between the ASU and Qantas Airways. The agreement related to job-share positions with Qantas Airways at airports across Australia. Both Ms Gartside and Ms Joyce argued that the Heads of Agreement formed the framework of the local job-share arrangements which apply at airports throughout Australia.

(b) Ms Gartside and Ms Joyce also rely upon the terms and conditions of a job-share arrangement in place at Perth Airport as at August 1998 for another employee of Qantas Airways, Ms Emmans.

51 The evidence given by Ms Gartside and Ms Joyce was recorded by the Commissioner as follows:

(a) Ms Joyce gave evidence that when she applied and completed an expression of interest for her job-share arrangement on 12 September 2007, she understood this role was ongoing and not time-limited. Ms Joyce also said that the job-share trial document she received from Qantas Airways dated 20 May 2008 contained different terms and conditions to those which she had been working under for the previous three months and she continued to work under her existing conditions and not the conditions specified in the job-share trial document. Although this document referred to her returning to her substantive role after the trial period had finished should an agreement not be reached with the ASU on a local agreement,

she remained in her job-share position with no agreement being reached between the ASU and Qantas Airways. When Ms Joyce received a letter from Qantas Airways on 5 June 2009 referring to her job-share arrangement expiring after five years, she responded by letter stating that she understood that her job-share arrangement was a permanent arrangement.

(b) Ms Gartside gave evidence that the job advertisement for Customer Service Agent Job-Share Level 3 articulated by Qantas Airways on or about 12 September 2007 was an ongoing position, because it did not state otherwise. She completed a staff vacancy form for this position. She did not agree at any stage to undertake her job-share role on a time-limited basis and when Qantas Airways advised her on 3 December 2012 that the job-share arrangement was to cease on 19 February 2013, she responded by stating that her position was not fixed term nor had she agreed to any job-share arrangement which was due to expire.

52 After considering the submissions made on behalf of both Ms Gartside and Ms Joyce and Qantas Airways, the Commissioner made the following findings:

(a) For an applicant to be successful in a claim for alleged denial of contractual benefits, a number of elements must be established. The claim must relate to an industrial matter pursuant to s 7 of the Act and the claimant must be an employee, the claimed benefit must be a contractual benefit that being a benefit to which there is an entitlement under the applicant's contract of service, the relevant contract must be a contract of service, the benefit claimed must not arise under an award or order of this Commission, and the benefit must have been denied by the employer: *Hotcopper Australia Limited v Saab* (2001) 81 WAIG 2704, also referred to *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867.

(b) The onus is on Ms Gartside and Ms Joyce to each establish that their claims are benefits to which they are entitled under their contracts of employment. The Commission must determine the terms of the contracts of employment and decide whether the claim constitutes a benefit which has been denied under these contracts having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case: *Belo Fisheries v Froggett* (1983) 63 WAIG 2394; *Waroona Contracting v Usher* (1984) 64 WAIG 1500; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

(c) The principles necessary to imply a term of contract in fact are set out in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*(1977) 180 CLR 266 (283). She also had regard to the principles that apply in implying a term into a contract based on custom and usage, which was set out in the decision of the High Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.

53 The Commissioner then found that:

(a) Ms Gartside and Ms Joyce were employed by Qantas Airways under contracts of service, and that their claims constituted an industrial matter for the purposes of s 7 of the Act as the claims relate to the status of their current employment. She also found that the benefit they were claiming did not arise under an award or order of the Commission. She then said that the issue to be determined was: what were the terms of their contracts of employment and whether it was a term of those contracts that they were entitled to an ongoing job-share position with Qantas Airways. In particular, the issue was whether the contracts of employment of Ms Gartside and Ms Joyce contained a term that their job-share roles are for a fixed term or ongoing.

(b) When Ms Gartside and Ms Joyce commenced employment with Qantas Airways as permanent part-time employees, their conditions of employment were contained in written contracts which, at the time, were to be read in conjunction with the *Airline Officers (Qantas Airways Limited) Award 2000* (the Award). The Award appears to have been replaced by a series of enterprise agreements negotiated between the ASU and Qantas Airways, which were referred to by the parties at the hearing. The enterprise agreements each contained a clause stating that local job-share agreements in place as at the date of lodgement of each enterprise agreement will continue to apply to existing and new job-sharers in the workplace concerned for the life of the agreement.

(c) The Heads of Agreement was agreed between the ASU and Qantas Airways in 1996. Its terms apply to Qantas Airways employees who work in job-share positions throughout Australia, including Ms Gartside and Ms Joyce, and the provisions contained in the Heads of Agreement form the basis of any negotiations for a local agreement. The Heads of Agreement provides that job-share positions of employees working at airports throughout Australia are ongoing and not time-limited unless agreed otherwise by an employee and Qantas Airways, or a different term is included in a local agreement negotiated between the ASU and Qantas Airways. Thus, it is a term of the contracts of employment of Ms Gartside and Ms Joyce that their job-share positions are ongoing on the basis that this term is implied into their contracts of employment based on custom and usage.

(d) The terms of the Heads of Agreement contemplate that the job-share positions of Ms Gartside and Ms Joyce are ongoing and not time-limited for a number of reasons. These are:

(i) The Heads of Agreement states that Qantas Airways will facilitate job-sharing where there is mutual agreement to a job-share arrangement when a job-share role is available to employees. This requirement is only fettered by efficiency and cost considerations which had not been raised by Qantas Airways as issues or impediments to an ongoing job-share arrangement;

(ii) The Heads of Agreement provides that if one job-sharer leaves, Qantas Airways will assist the job-sharer to find a new partner so that these positions will continue to be ongoing and the only reference in the Heads of Agreement to job-share positions being time-limited applies when a job-share employee undertakes this position to cover for maternity leave.

(e) Job-share employees who commenced in this role at Perth Airport before 2008 whose terms and conditions of employment were subject of the Heads of Agreement have ongoing and not time-limited, written contracts of employment. Ms White's evidence that when the terms of the Heads of Agreement have been applied to the contracts of job-share employees at other airports throughout Australia, these employees have not worked in that role for a fixed term. This adds weight to the finding that the Heads of Agreement provides that job-share positions at airports throughout Australia are ongoing.

(f) The term in the Heads of Agreement that job-share positions are ongoing can be implied into the contracts of employment of Ms Gartside and Ms Joyce by custom and usage as this term is not contrary to any express term of the agreement between Ms Gartside and Ms Joyce and Qantas Airways, and the Heads of Agreement were relied upon and well known to job-share employees and Qantas Airways prior to 2008.

(g) The job-share contracts of employment of Ms Gartside and Ms Joyce were never varied to include a term that their positions were time-limited. The claim by Qantas Airways that Ms Gartside and Ms Joyce were only offered fixed term job-share positions and the terms of their contracts of employment is rejected. When Qantas Airways decided to expand the number of job-share positions at Perth Airport in 2007 and did so on or about February 2008, the ASU on behalf of its members, did not finalise a local agreement with Qantas Airways about whether the job-share positions, including those of Ms Gartside and Ms Joyce, would be time-limited. Further, no legal agreement was or had been reached between the ASU and Qantas Airways to vary the terms of the Heads of Agreement for job-share employees working at Perth Airport. Written contracts containing a term that the job-share positions were time-limited were given to Ms Gartside and Ms Joyce by Qantas Airways for signing and acceptance after they had been working in their job-share positions for over 10 months[sic]. This proposed variation to their existing contracts of employment was not accepted by Ms Gartside and Ms Joyce as they did not sign or agree to this offer.

(h) As the terms of the Heads of Agreement were not varied by agreement between Qantas Airways and Ms Gartside and Ms Joyce, which is a requirement to vary terms of an existing contract of employment, they remained in their existing ongoing job-share positions. Furthermore, Qantas Airways did not prevent Ms Gartside and Ms Joyce from continuing in their job-share roles after they did not agree to the positions being time-limited.

Grounds of appeal

54 The grounds of each appeal in each appeal are the same. These are as follows:

1. The Commission in finding that it is a term of each of the Respondents' contract of employment that the job share position occupied by the Respondents is ongoing, on the basis that this term is implied into the Respondents' contract of employment based on custom and practice:
   (a) erred in law and acted contrary to well established principles for the implication of terms into contracts;
   (b) erred in fact in circumstances where there was relevantly no such custom and practice and the Appellant had offered and each of the Respondents had accepted the position on an entirely different basis.
2. The Commission erred in law and in fact in misconstruing the facts and failing to find that:
   (a) the offer of a job share arrangement made by the Appellant to each of the Respondents, and accepted by each of the Respondents, was on the basis that the position would in the first instance be for a six month trial period which, if successful, would extend for a further four and a half years;
   (b) the positions were available for a maximum period of five years (subject to any extension for a further fixed term).
3. The Commission erred in law in failing to construe or properly construe the notice to the Respondents on June 5 2009, or to give effect or proper effect to the notice.
4. The Commission erred in law and in fact in finding that the terms and conditions of employment of the Respondents were subject to the terms of 'Heads of Agreement dated 19 August 1996' (HOA) when:
   (a) there was no valid basis for so finding;
   (b) the Commission failed properly to construe and apply the terms of the HOA in light of its purpose, context and all of its text; and
   (c) the Commission construed the HOA in light of other individual contracts of employment between the Appellant and certain employees without having regard to the text and context of those other contracts, and then applying that correct contractual meaning to the principles governing the implication of terms into the contracts.
5. The Commission, having erred in each of the ways specified above, further erred in law in purporting to order that the Appellant continue to employ the Respondents on an ongoing basis in accordance with their contracts of employment.

Submissions made on behalf of Qantas Airways

55 Mr Dixon SC points out on behalf of Qantas Airways that the decisions the subject of the appeals do not arise out of a discretionary judgment. The question is not whether it was open to the Commissioner to come to the conclusions that she did, the issue is what at law was the meaning of the contracts of employment and the job-share arrangements made during the course of that employment.

56 It is also pointed out that the basis of the implication of the term that the job-share arrangements of Ms Gartside and Ms Joyce were ongoing relied essentially on two documents, namely, the Heads of Agreement and a memorandum from Qantas Airways to Ms Emmans dated 12 August 1998 which set out the basis of Ms Emmans' transfer to a job-share position.

57 The decisions the subject of these appeals are said to be erroneous on a number of central grounds as follows:

(a) Ms Gartside and Ms Joyce entered into contracts of employment in 2004 for part-time work which permit changes to the hours and patterns of work from time to time;

(b) There was an express basis upon which Qantas Airways offered a job-share arrangement and those arrangements were accepted in February 2008;

(c) There was no evidentiary or legal basis for implying into the contracts of employment a term which, in effect, bound Qantas Airways to never change the job-share arrangements absent termination of the employment of Ms Gartside and Ms Joyce. This issue deals with the question of whether, by way of custom and usage, such a term ought to have been implied into the contracts of employment and, if so, whether there could never be any change to the duration of the arrangement;

(d) In the alternative, assuming a term was and could be implied into each employment contract that each job-share arrangement was ongoing as opposed to for a fixed term, it was open to Qantas Airways to give notice, or reasonable notice, terminating the arrangements, which required the employees to revert to their previous part-time hours and pattern of work, and such notice was given in June 2009.

(a) The 2004 contracts of employment

58 The first argument put on behalf of Qantas Airways is that the terms of each contract of employment of Ms Gartside and Ms Joyce only initially set the hours of part-time work, whereas hours of work could change by regard to current operational requirements. Thus, there was ability to change the pattern of work and that allowed Qantas Airways to vary both the hours and pattern of work for its operational requirements. Consequently, it is said that the job-share arrangements entered into were no more than arrangements contemplated within the express terms of each contract of employment and it was not necessary at any stage to terminate the 2004 contracts of employment to enter into the job-share arrangements. Although the job-share positions allowed part-time employees to occupy a full-time line and share the responsibilities of the full-time line with another part-time employee, the employees remained engaged in a form of part-time employment with slightly reduced hours and a different pattern of work.

59 Instead of a minimum of 20 hours of work provided for in the Hours of Duty clauses of the 2004 contracts of employment, each employee was obliged to work 19 hours in an arrangement shared with another employee. Also they had some flexibility in how they managed the responsibilities for carrying out the 76 hours per fortnight, or 38 hours per week, so that each employee was to work a half share of the nominated hours. The other change was that instead of working a rotational part-time roster, they worked a full-time line on the roster.

60 These arrangements, Qantas Airways says, were clearly contemplated in the express terms of the 2004 contracts of employment. Whilst Qantas Airways concedes there was some implication in relation to the entitlement to payment of overtime under the new arrangements, it says the job-share arrangements did not constitute a variation of the contracts of employment; they were simply changes to hours and patterns of work authorised by the terms of the original contracts of employment.

(b) The terms of the arrangements to job-share a full-time position

61 Qantas Airways points out the case put on behalf of Ms Gartside and Ms Joyce at first instance after all the evidence had been led, was seemingly based on the following propositions:

(i) Ms Gartside and Ms Joyce each entered into a new contract of employment with Qantas Airways at some point after making a successful application to Qantas Airways' invitation of expressions of interest in a job-share arrangement at Perth Airport in September 2007.

(ii) These contracts were contracts for 'job-share employment', which was said to be implied in fact.

(iii) It was into these contracts that a term of 'permanency' was to be implied.

62 The Commissioner proceeded on the basis that a finding that Ms Gartside and Ms Joyce are employed by Qantas Airways 'under contracts of service' and that the issue to be determined therefore, was what the terms of their contracts of employment are and whether it is a term of each contract that they are entitled to an ongoing job-share position with Qantas Airways.

63 Qantas Airways complains that the Commissioner did not appear to identify whether the contentions made on behalf of Ms Gartside and Ms Joyce that new contracts of employment were entered into in 2008 were accepted. It is also not clear from her reasoning whether the term to be implied by reference to custom was implied into:

(i) the original contracts of employment and, if so, when;

(ii) a new contract of employment made some time in 2008 and, if so, when; or

(iii) a new contract of employment made some time after 2008 and, if so, when.

64 Qantas Airways contends there were no new contracts of employment entered into in 2008. They also say that in 2008, Qantas Airways was entitled to offer to Ms Gartside and Ms Joyce, its existing employees, job-share arrangements on terms acceptable to it, which specified the duration of the arrangements, which, if it chose, differed from other offers previously made to other employees; or which permitted, either by means of a fixed term or by the giving of notice, that the arrangements be terminated. Thus, they say, it was within the contemplation of the parties in 2004 pursuant to the express terms of the

contracts of employment that changes could be made to the part-time arrangements and importantly, that a change, once made, was not irrevocable.

65 From November 2007, Qantas Airways and the ASU discussed the terms of a local job-share agreement for customer service employees. Both Ms Gartside and Ms Joyce were involved in those negotiations. Thus the ASU acted as a representative of Ms Gartside and Ms Joyce. Qantas Airways' position throughout the negotiations was that the job-share arrangements at Perth Airport would only be on fixed-term secondment from the employees' substantive roles. Qantas Airways gave written advice to the ASU that there would be a six month trial and if the trial was successful, Ms Gartside and Ms Joyce, among others, would be offered a job-share role at Perth Airport for a further four and a half years on terms set out in Version 14, which would be applied as a matter of policy, pending any subsequent agreement that may be reached with the ASU.

66 The agreed facts record that the ASU advised Qantas Airways in writing that its members would commence to act in job-share positions from 13 February 2013 for a six month trial, and both Ms Gartside and Ms Joyce commenced working their job-share arrangements in the week commencing 20 February 2013.

67 Thus, the evidence established that job-share arrangements offered and accepted by Ms Gartside and Ms Joyce in February 2008:

(a) were no more than more flexible employment arrangements;

(b) did not give rise to any new contracts of employment;

(c) did not import into the contracts of employment terms for the performance of work on a job-share basis which imposed on Qantas Airways the obligation and restriction to continue to employ Ms Gartside and Ms Joyce on those job-share arrangements on an indefinite or ongoing basis;

(d) did not preclude an entitlement on the part of Ms Gartside and Ms Joyce to bring such arrangements to an end; and

(e) expressly provided for Ms Gartside and Ms Joyce to revert to their former positions at the conclusion or termination of the arrangement (without bringing the contracts of employment to an end).

68 Qantas Airways also says there was no basis upon a foundation of custom and usage to imply into Ms Gartside and Ms Joyce's contracts of employment, or into the flexible job-share arrangements made in 2008, a term whereby it is to be imputed to the parties to the contract of employment, or the parties to a job-share arrangement that the arrangements were permanent and ongoing. It points out, in order to imply a term into each of the contracts of employment of Ms Gartside and Ms Joyce, on grounds of custom and usage, it was necessary for Ms Gartside and Ms Joyce to each establish, by probative evidence, that:

(a) there existed the alleged custom and usage;

(b) the general notoriety of the custom made it reasonable to assume that the parties contracted with reference to the custom so that it is therefore reasonable to import such a term into the contract: *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 (440) (McHugh and Gummow JJ);

(c) both parties knew and would, if asked, unhesitatingly have agreed that these terms would be part of the bargain: *Byrne* (440) (Quoting from *Liverpool City Council v Irwin* [1997] AC 239 (253);

(d) the custom and usage was so well known and acquiesced in that everyone making a contract in that situation can be reasonably presumed to have imported that term into the contract: NC Seddon & Ellinghous, *Cheshire & Fifoot's Law of Contract*, (10th Australian Edition) (485);

(e) the custom and usage itself was uniform, notorious, reasonable and certain: *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 (353) [60] (Kirby and Hayne JJ); and

(f) because the importation of the term rests in the presumed intention of the parties, that there was no express term of the contract, whether the contracts be oral or in writing, to which it must yield: *Byrne* (440).

69 Qantas Airways says when the evidence is examined, each limb of this test is not met. Firstly, it says the evidence did not establish that the alleged custom and usage existed. In particular, the Heads of Agreement itself could not be regarded as establishing a custom and usage. It was simply an agreement made between Qantas Airways and the ASU to facilitate local agreements. In any event, the terms of that document expressly envisages that if an arrangement came to an end, the employees will revert back to their full-time positions and be required to work full-time hours. However, the employees in these matters were part-time employees prior to entering into the job-share arrangements. Consequently, the Heads of Agreement had no application to their terms and conditions of employment. They also point out, the Heads of Agreement had no contractual basis, and has no contractual status in relation to the employment relationship between Qantas Airways and Ms Gartside and Ms Joyce.

70 Secondly, in the alternative, even if a custom of ongoing job-share arrangements could be said to *prima facie* be established, it is not reasonable to imply a term whereby job-share arrangements could never be changed by Qantas Airways, particularly in circumstances where the employees expressly have the ability to depart from the arrangements. Even if it could be said that the Heads of Agreement had application, it was expressly contemplated by the terms of the Heads of Agreement that changes in arrangements could occur; in particular there were to be no restrictions to apply subject to efficiency/costs not being compromised. Also, it is clearly contemplated by the terms of the Heads of Agreement that its terms were not absolute; it allowed Qantas Airways and the employees to agree otherwise and it is Qantas Airways' case that they did, in these matters, agree otherwise.

71 Thirdly, they say a term implied on this basis must yield to the actual intention of the parties. If you ask the question whether or not both parties would have unhesitatingly agreed to a term that the job-share arrangements were to be ongoing, the answer

is no, as Qantas Airways through its representatives made it plain that the Perth Airport job-share arrangements were offered only on a fixed-term basis.

72 Fourthly, it could not be said that the custom and usage relied upon by Ms Gartside and Ms Joyce was uniform, notorious, reasonable and certain. The Heads of Agreement only applied to full-time positions. Also, the terms and conditions of the job-share arrangements of Ms Emmans and Ms Meakins were not the same. In particular, Ms Meakins' contract expressly contemplates that her job-share arrangement could be terminated for any reason.

(c) Termination by notice

73 In ground 3 of the grounds of appeal it is argued on behalf of Qantas Airways that regardless of the basis upon which the job-share arrangement was made in 2008, it was entitled, upon giving notice, to terminate the arrangements. It says that it was not precluded from doing so by reason of any contrary term in the contract of employment or pursuant to the terms of each job-share arrangement made available to the employees. It says it can be implied by operation of law that a party may terminate an arrangement such as a job-sharing arrangement on notice. In support of this argument, Qantas Airways relies upon the well-established principle which implies a term in law of reasonable notice of termination in all ongoing contracts of employment.

74 Qantas Airways says it did provide Ms Gartside and Ms Joyce reasonable notice to terminate the job-share arrangements. On 23 April 2009, Qantas Airways advised the ASU in writing that as it could not agree to the ASU's demands that the job-share positions were to be filled on a permanent basis and there was no agreement to a local job-share agreement with the ASU at Perth Airport. On 5 June 2009, Qantas Airways sent letters to Ms Gartside and Ms Joyce in which it advised that the job-share arrangements had been finalised and that the terms of job-share positions were attached and would continue under these terms until 19 February 2013.

(d) The terms of the orders

75 Ground 5 challenges the terms of the Orders made in these appeals. Qantas Airways says that the Orders declaring that it is a term of the current contract of employment that Ms Gartside and Ms Joyce be employed in their job-share positions on an ongoing basis cannot stand to the extent that the Orders are intended to prevent Qantas Airways from terminating the contracts of employment in accordance with the enterprise bargaining agreements that apply by operation of law.

Submissions made on behalf of Ms Gartside and Ms Joyce

76 It is argued on behalf of Ms Gartside and Ms Joyce that they did not accept an offer of job-share arrangements that was time-limited. It is also argued that the Commissioner correctly found that, in 2008 although written contracts containing a term that the job-share positions were time-limited were given to Ms Gartside and Ms Joyce to sign, the proposed variation of their existing contracts of employment was not accepted by them.

77 It is accepted that the Heads of Agreement does not have any contractual force in respect of the contracts of employment of Ms Gartside and Ms Joyce . However, it is contended that the Heads of Agreement set a 'context' for the terms which enlivened custom and usage for persons who enter into job-share arrangements after the ASU and Qantas Airways entered into the Heads of Agreement. Thus, it is said that between 1996 and 2008 the Heads of Agreement reflected the understandings of the rights and obligations of the ASU and Qantas Airways, and formed the basis upon which the terms of the contracts of employment of job-share employees were arrived at.

78 Whilst it is conceded that the terms of the Heads of Agreement do not contemplate a part-time employee taking up a job-share arrangement because the terms of the agreement contemplates reversion to a full-time position and not reversion to a part-time position, it is pointed out that the Heads of Agreement specifically contemplates the circumstances by which a job-share arrangement can come to an end. In particular, if one person resigns their employment, the other person is then required to fulfil the entire obligation of the full-time position if another job-sharer cannot be found.

79 The employees say evidence of Ms White relevantly establishes that after the Heads of Agreement was struck, approximately 170 Qantas employees were engaged in job-share positions around Australia, and all of these arrangements were ongoing and permanent. This is said to be evidence of 'custom and usage, and this custom and usage is reflected in the contracts of employment entered into by Ms Emmans and Ms Meakins whose contracts are not time-limited but provide for termination of the job-share arrangement in particular circumstances. It is said that the relevance of Ms Emmans' and Ms Meakins' contracts of employment is not that they applied by way of custom and usage; those contracts simply are indicative of the custom and usage that prevailed.

80 They also argue that the Heads of Agreement does not require a local agreement being entered into; rather, that local agreements arise out of the provisions of the relevant enterprise bargaining agreements which provide that local job-share arrangements that are in place as at the date of lodgement of the enterprise bargaining agreement, will continue to apply to existing and new job-sharers in the workplace concerned, for the life of the agreement. Thus, it is said it is custom and usage that when job-share arrangements are offered, those job-share arrangements would be ongoing.

81 Although there was no local agreement for job-share arrangements at Perth Airport, a local agreement was not required to be in place because the Heads of Agreement did not require a local agreement to be made. They also say that Qantas Airways has not provided any authority for the proposition that the examination of relevant matters going to custom and usage should be confined to Perth Airport. The question of custom and usage is a question of evidence, and Qantas Airways led no evidence to contradict the evidence given on behalf of Ms Gartside and Ms Joyce. Thus, they say that it is not open to Qantas Airways to now argue that the term was not 'well known and acquiesced in' when there is no factual foundation for that argument.

82 Ms Gartside and Ms Joyce argue a number findings should be made by the Full Bench. These are:

(a) It is a fundamental term of each employment relationship that the employee works in a job-share arrangement.

(b) Both Ms Gartside and Ms Joyce wrote to their employer, Qantas Airways, putting good reasons why they should be offered the opportunity to transition from part-time permanent employment, to a type of employment that is job-share and permanent.

(c) The 2004 contracts of employment did not remain on foot. Alternatively, the 2004 contracts were varied in 2008. In particular, the job-share arrangements were a significant variation of the type of employment, as a job-share arrangement is in a separate category of employment to part-time employment. Thus, the introduction of the job-sharing of a full time line of work could not be regarded as a change in rostered hours and working arrangements within the meaning of the 2004 contract of employment. In support of this argument, they rely upon the reasons for decision given by the Full Bench of the Australian Industrial Relations Commission in *Qantas Airways Ltd v Australian Municipal, Administrative, Clerical and Services Union* [Print T0301], del 7 September 2000 (Notification of industrial dispute regarding refusal to job-share), which was an appeal against a decision by Whelan C (in Print S1745) in *Australian Municipal, Administrative, Clerical and Services Union v Qantas Airways Limited* [Print S1745] del 8 December 1999. That matter concerned a notification of a refusal by Qantas Airways to conduct a job-share trial in its retail sector. It is contended that in the reasons for decision by the Full Bench at [55] – [57] the Full Bench accepted the findings made by Whelan C at first instance, that job-sharing is a type of employment that is distinguishable from regular part-time employment.

(d) The expression of interest for positions of Customer Service Agent (Job-Share) was not an expression of interest for positions on secondment, or for a fixed term: tab 24, AB 305-306. In particular, if the positions were to be for a fixed term, it would have been stated in the expression of interest as the usual practice by Qantas Airways when issuing an expression of interest for a fixed term on secondment was to state that was so in the expression of interest: see tab 25, AB 307, Ticketing Officer Level 5 Part-Time (12 Month Secondment). It is conceded, however, that the expression of interest for the job-share positions did not constitute an offer that, if accepted, formed the terms of the contracts of employment in these matters.

(e) At the time Ms Gartside and Ms Joyce were appointed to the positions of Customer Service Agent (Job-Share), they were subject to a trial period of six months, subject to an agreement being reached with the ASU. As Qantas Airways had not reached an agreement with the ASU at the expiry of the trial period, it was incumbent upon them to inform both of the employees that they were required to revert to their permanent part-time positions. However, that did not occur and Ms Gartside and Ms Joyce continued in their job-share positions.

(f) Qantas Airways made it plain to the employees that the temporary transfer to the job-share position on a trial basis for six months, with the view to being extended for a further fixed period, was dependant on agreement with the ASU in regard to a local agreement.

83 They say that if these findings are made, that in the absence of an agreement being reached about the term of the job-share arrangements, a term based on custom and usage that Ms Gartside and Ms Joyce had each been appointed to the positions on an ongoing basis could be implied into their contracts of employment. In the alternative, it is argued that immediately following the expiry of the six month trial, as Ms Gartside and Ms Joyce continued to work the job-share arrangements, a term could be implied into the contracts of employment that the job-share arrangements became ongoing.

84 The employees also argue that although there was a lengthy process of the parties disagreeing and being engaged in negotiations as to whether the job-share arrangements should be for a fixed term or permanent and ongoing, a term that the job-share arrangements were permanent and ongoing can be implied when there was no agreement, as the custom relied upon was so well known and acquiesced in that everyone making the contract in that situation could reasonably presume to have imported that term into the contract. They point out that it is not necessary that the custom be universally accepted, for such a requirement would always be defeated by the denial of one litigant of the very matter that the other party seeks to prove in the proceedings: *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 (236). There was no express term in the contracts of employment of Ms Gartside or Ms Joyce that limited the time during which they could perform the job-share arrangements. In the absence of such a term, the arrangements must be regarded as permanent and ongoing as all other job-share arrangements in existence in Qantas Airways in Australia were permanent and ongoing.

85 They say the letter sent to Ms Gartside and Ms Joyce dated 5 June 2005 was simply an attempt by Qantas Airways to unilaterally vary the terms of the job-share arrangement. Once the job-share arrangement commenced and the conditions sought to be imposed by Qantas Airways were not met and Qantas Airways accepted ongoing performance consistent with an ongoing contract of employment, the employer must be taken to have accepted that the job-share arrangements would be ongoing. Thereafter any attempt to time-limit the arrangements was an attempt to vary the terms unilaterally.

86 They also say that the job-share arrangements were not terminable by the giving of notice, as the contract of employment continues. Any attempt to vary a fundamental term of the contract would constitute a repudiatory breach which would have entitled Ms Gartside and Ms Joyce to either terminate their contracts and sue for breach or alternatively affirm the contracts and continue the contracts on foot.

87 In these circumstances, the fixed-term proposal was nothing more than an offer to vary the existing contract, which offer was never accepted by Ms Gartside or Ms Joyce.

88 In relation to ground 5 of the grounds of appeal, they say that having appropriately implied the necessary term into the contracts of employment of Ms Gartside and Ms Joyce, namely that the job-share arrangements were ongoing, not only was the Commissioner right to make the Orders made, she was required to do so. However, it is conceded that the Orders cannot constrain the power of Qantas Airways as an employer to terminate the employer-employee relationship in its entirety in circumstances such as redundancy, or for cause in circumstances of serious misconduct.

Consideration

(a) The Heads of Agreement

89 It is properly conceded on behalf of Ms Gartside and Ms Joyce that the Heads of Agreement has no contractual force in respect of the contracts of employment of Ms Gartside and Ms Joyce. However, it is argued that the Heads of Agreement set a 'context' which enlivened custom and usage between 1996 and 2008 throughout Australia of Qantas Airways employees being engaged in job-share positions on a permanent and ongoing basis. Further, that the terms and conditions of the job-share contracts of Ms Emmans and Ms Meakins provide evidence of this custom and usage. Whilst counsel for Ms Gartside and Ms Joyce made a valiant attempt to persuade the Full Bench that this submission was correct, it is plain that when regard is had to the evidence of Ms White, the express terms of the Heads of Agreement, and to the express terms of the contracts of Ms Emmans and Ms Meakins, this submission has no merit. This evidence establishes the following facts:

(a) The Heads of Agreement is a framework for negotiating local job-share agreements. From this evidence, it can be inferred that the ASU and Qantas Airways contemplated in 1998 that specific agreements would be negotiated in each airport (or perhaps in particular worksites of an airport).

(b) In entering into a local arrangement, efficiency and cost was not to be compromised.

(c) The Heads of Agreement only expressly contemplates job-share arrangements being taken up by a full-time employee to share a full-time line of work, but does not contemplate a part-time employee entering into an arrangement to job-share a full-time line of work.

(d) Whilst it may be strongly arguable that the express terms of Ms Emmans' contract of employment entitled her to work in a permanent ongoing job-share position as the terms of her contract effected a transfer to a full-time job-share with no express right conferred on Qantas Airways to terminate that arrangement, the terms of her contract required her to revert to a full-time position in the event that her job-share partner left or permanently changed hours. The terms of Ms Meakins' contract are materially different. Although it is not clear whether Ms Meakins was a full-time or part-time employee of Qantas Airways prior to entering into the job-share arrangement, the terms of her agreement expressly contemplate termination of the arrangement to job-share 'for any reason' and a return to her substantive position.

(e) The words 'should for any reason the job share terminate' in Ms Meakins' contract cannot be characterised as being confined to circumstances where the job-share partner wishes to cease job-share arrangements. This contingency is dealt with separately in her contract. Further, if a new job-sharer cannot be found, the remaining job-sharer is required to revert to their substantive position.

(f) Whilst evidence was given by Ms White that she was aware of 170 employees of Qantas Airways around Australia that were engaged in ongoing, permanent arrangements, this evidence of itself should not have been given much, if any, weight as it is not apparent as to how many of these arrangements were entered into pursuant to, or authorised by, local agreements. Where a local agreement is entered into, job-share arrangements have statutory force and application to existing and new job-share employees of Qantas: cl 20 of the *Australian Services Union (Qantas Airways Limited) Agreement*: tab 18, AB 188. At Perth Airport, however, no local agreement has been reached.

90 Thus, when analysed, these facts did not establish, to the requisite standard of proof, that the Heads of Agreement enlivened custom and usage of engaging employees to work in job-share positions at Perth Airport on a permanent and ongoing basis. To satisfy the test for implication of a term on grounds of custom and usage, the evidence must establish that the practice relied upon is uniform, notorious, reasonable, certain, and that the standard of proof required to establish a custom is high. In *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48; (1973) 47 ALJR 326; (1973) 1 ALR 1 Stephen J, with whom Menzies and Gibb JJ agreed, observed at (61):

> In *Thornley v. Tilley* (1925) 36 CLR 1 (8) Knox C.J. adopted the words of Jessel M.R. in *Nelson v. Dahl* (1879) 12 Ch. D. 568 (575), describing the alleged existence of a usage as
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> > "a question of fact, and, like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself."
>
> Reference may also be made to *Summers v. The Commonwealth* (1918) 25 CLR 144, per Isaacs J. (148), affirmed on appeal ((1919) 26 CLR 180). In *Anderson v. Wadey* (1899) 20 LR (NSW) 412 (417 – 418), Darley C.J. adopted a passage from *Browne on Usage and Custom* (1875) which accords with what I understand to be the law:
>
> > "Seeing that custom is only to be inferred from a large number of individual acts, it is evident that the only proof of the existence of a usage must be by the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must shew a certain course of business and an established understanding respecting it."
>
> In *Shire of Rodney v. Vibert* [1915] VLR 338, Madden C.J. approached the matter in much the same way.

(See also *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 (236) and [60]).

91 Whether the existence of a custom is sufficiently settled in its observance is a matter of fact and degree: *Con-Stan* (240).

92 In these matters, the evidence establishes that there is a framework agreed to by the ASU and Qantas Airways that allows for specific arrangements to be entered into. At Perth Airport two job-share arrangements had been entered into (prior to Ms Gartside and Ms Joyce entering into job-share arrangements), the terms of which are not the same. In particular, one arrangement expressly provides for termination for any reason which could arguably empower Qantas Airways to bring that

arrangement to an end on any grounds. Although it may be inferred that any 'ground' must be a ground that is reasonable, I make no binding finding in that regard.

93 In these circumstances, when considering the terms of the contracts of Ms Gartside and Ms Joyce, there is an insufficient foundation to find that the custom alleged has been proved to the high standard which the law requires.

94 Thus, the imputed term could not be found to have crystallised in custom and practice.

95 In any event, at its highest, all that could be said to have crystallised from the Heads of Agreement as a matter of custom and practice is that Qantas Airways was bound to enter into negotiations with the ASU for a local agreement for job-share arrangements in particular workplaces where efficiency/cost is not compromised. However, no local agreement was reached at Perth Airport.

96 For these reasons, I am of the opinion that no applicable custom or usage in 2007, 2008 or 2009 that job-share arrangements are to be permanent and ongoing can be said to apply to the contracts of employment of Ms Gartside and Ms Joyce.

(b) The terms of the contracts of employment of Ms Gartside and Ms Joyce

97 The task of the Commission when determining an industrial matter referred by an employee who makes a claim under s 29(1)(b)(ii) of the Act, is to decide what the terms of the contract are and were, and whether or not they have been complied with by the employer. The Commission does not have licence to disregard, add or subtract from the terms of the contract and order a benefit because it thinks it would be equitable or fair: *Health Services Union of Western Australia (Union of Workers) v Director General of Health* [2008] WAIRC 00215; (2008) 88 WAIG 543 [173] (Ritter AP).

98 The onus however is on an employee referring a claim of denied contractual benefit to prove the benefit claimed and if established, the denial of the benefit.

99 The points in issue in these appeals are:

(a) Whether the 2004 contracts of employment remained on foot from the time Ms Gartside and Ms Joyce began working in the job-share arrangements of one full-time line of work; or whether agreements were reached to vary the 2004 contracts of employment.

(b) If an agreement was formed in 2008 between each party to the contracts of employment to vary the 2004 contracts in respect of the duration of the job-share arrangements, what were the terms of those variations.

100 The terms of the contract must be construed at the time the contract was entered into. What must be ascertained is what a reasonable person would have understood the terms of the contract to mean, taking into account not only the text but also the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [140]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 [22].

101 Evidence of surrounding circumstances is admissible to assist in the interpretation of a contract if the language is ambiguous or susceptible to more than one meaning: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337, 352; *McCourt v Cranston* [2012] WASCA 60 [20]. Surrounding circumstances are to be distinguished from any antecedent negotiations and the actual intentions, aspirations or expectations of the parties: *Director General, Department of Education v United Voice WA* [2013] WASCA 287; (2014) 94 WAIG 1 [91] (Buss J).

102 As to admissibility of the subsequent conduct, I recently observed in *Landsheer v Morris Corporation (WA) Pty Ltd* [2014] WAIRC 00034; (2014) 94 WAIG 37 at [27] – [28]:

> 27 Whilst the principle may have been controversial, it is now accepted that a court or tribunal cannot look at subsequent conduct to interpret a written agreement: *Hughes v St Barbara Ltd* [2011] WASCA 234 [106] (Pullin JA); *The Administration of the Territory of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 446 (Gibbs J); *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 [35] (Gummow, Hayne and Kiefel JJ).
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> 28 However, regard may be had to subsequent conduct of the parties for the purposes of determining what were the entire terms of the contract. In *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 Spigelman CJ said [21] - [27]:
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> > In my opinion, subsequent conduct, especially how a contract for purchase and sale was settled, is relevant, on an objective basis, to the identification of the subject matter of the contract or the determination of necessary terms, as distinct from deciding the meaning of words.
> >
> > In *Carmichael v National Power Plc*, supra, the House of Lords had to determine whether a person performed work under a contract of employment, within the meaning of a statute. The House of Lords overruled a Court of Appeal decision that, on the proper interpretation of documents pursuant to which the casual work arrangement had been made, there was such a contract. When rejecting a submission that reliance on post contractual conduct was inconsistent with the objective approach to identifying and interpreting a contract and that the subjective belief of the parties was irrelevant, Lord Hoffmann said at 2050:
> >
> > > 'This austere rule would be orthodox doctrine in a case in which the terms of the contract had been reduced to writing. But I do not think that it applies to a case like the present. In a case in which the terms of the contract are based upon conduct and conversations as well as letters, most people would find it very hard to understand why the tribunal should have to disregard the fact that Mr Lovatt and Mrs. Carmichael both agreed that the CEGB were under no obligation to provide work and the applicants under no obligation to perform it. It

> is, I think, pedantic to describe such evidence as mere subjective belief. In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief ... But the terms of the engagement must have been discussed and these conversations must have played a part in forming the views of the parties about what their respective obligations were.
>
> The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed.'

A second matter often referred to is the uncertainty that would be introduced into commercial relationships by reliance on post contractual conduct. (See *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 316; *FAI v Savoy Plaza* supra at 350.) This consideration, in my opinion, is not material when the issue to be determined arises from uncertainty about the subject matter of the contract or the failure to expressly address necessary terms.

All of the cases on which the respondents relied involved contracts in writing. Where, as here, the issue is the identification, as a matter of fact, of the subject matter of the contract, as distinct from the interpretation of the contract, subsequent conduct, especially conduct at the time of settlement is, in my opinion, entitled to significant weight.

As in the case of reference to pre-contractual conversations, the fact that the relevant part of the contract here under consideration was not in writing determines the admissibility of such conduct. (See *Wilson v Maynard Shipbuilding Consultants* [1978] QB 665 at 675; *Mears v Safecar Security Ltd* [1983] QB 54 at 77-8; Lewison op cit at [3.15] p 111, 114; J L R Davis (ed), *Contract: General Principles* (2006) Thomas Law Book Co esp at [7.4.460] at [10] p 384; [7.4.560] p 392; [7.4.610] p 393-394.)

The reasoning of Lord Wilberforce in *Liverpool City Council v Irwin*, set out at [12] above, was expressly applied to reject the applicability of the rule that post contractual conduct cannot be used in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] EWCA Civ 7; [1976] 1 WLR 1213 per Megaw LJ at 1221, because:

> 'We are here concerned not with construing a contract but with evidence as to what the terms of a contract were.'

Similarly Browne LJ said at 1229:

> 'In the present case, the question is not one of construction of the contract, but of what were the terms of an oral and only partially expressed contract. In my opinion, the court can in such a case take into account what was done later as a basis for inferring what was agreed when the contract was made, or as establishing later additions or variations.'

103 In my opinion, whether the 2004 contracts of employment remained on foot after Ms Gartside and Ms Joyce began the job-share arrangements of a full-time line of work in 2008, turns on whether the job-share arrangements constituted part-time work and whether the job-share arrangements could be characterised as hours and patterns of work contemplated in the Hours of Duty clauses of the 2004 contracts of employment. If so, the next question to be determined is whether the notice provision in the Hours of Duty clauses can be said to authorise notice given to terminate the job-share arrangements.

104 The observations of Whelan C and the Full Bench in the matter of the notification of industrial dispute regarding refusal to job-share decision ([Print S1745) and [Print T0301]) do not assist in considering whether the job-share arrangements entered into by Ms Gartside and Ms Joyce are part-time arrangements of work. In that matter, Qantas Airways contended that a refusal by it to conduct a job-share trial in the retail sector of its operations was not a matter which fell within s 89A(6) of the *Workplace Relations Act 1996* (Cth) (the WR Act). Section 89A(6) referred to 'type of employment, such as full-time employment, casual employment, regular part-time employment and shift work.' In her reasons for decision, Whelan C observed [Print S1745] [20]:

> [20] Section 89A(2)(r) gives the Commission power to arbitrate with respect to '*type of employment*'. Types of employment are clearly not limited to those referred to in the sub-section. Applying the ordinary meaning of type of employment, having regard to industrial relations usage, I am satisfied that job-sharing is a type of employment, in the same way that regular part-time employment, temporary employment or casual employment is a type of employment and is, therefore, an allowable matter within section 89A(2)(r).

105 She also found that:

(a) evidence given on behalf of the ASU established that the Heads of Agreement outline the principles that governed the job-sharing arrangements around the airline;

(b) this was a dispute about whether job-sharing is a suitable type of employment for the retail side of the business; and

(c) the issue was whether it would be unfair not to allow employees in the retail sector access to a condition of employment provided for in the Heads of Agreement and made available to employees in other parts of the business.

106 Consequently, Whelan C was satisfied the Australian Industrial Relations Commission had the capacity to arbitrate such a dispute within the powers conferred by s 170LW of the WR Act and cl 5 of the Australian Services Union (Qantas Airways Limited) Enterprise Agreement IV: [38]. Commissioner Whelan did not consider whether job-sharing was a different type of employment from part-time employment. Nor did the Full Bench in its reasons for decision consider this issue. When regard is had to the broad definition of 'type of employment' in s 89A(6) of the WR Act, it is apparent it was not necessary to undertake such characterisation. The definition of type of employment in s 89A(6) was not exclusive and included 'shift work' which is usually not regarded as a separate type of employment from full-time, part-time or casual employment as each of those categories of employment can also encompass shift work.

107 It is my opinion that part-time work in the absence of any applicable definition in an award or enterprise agreement is an obligation to work less than the hours of work of full-time work, which in turn entitles a person contracted to work part-time to pro-rata benefits, including pro-rata pay of a full-time employee calculated by the hours worked, and pro-rata entitlements to sick leave, annual leave and long service leave. Whilst the evidence given in these matters did not directly address this issue, it appears that it was not in dispute at first instance that the job-share arrangements entered into by Ms Gartside and Ms Joyce required each to work up to 50 per cent of the hours of a full-time line of work, being 38 hours per fortnight.

108 The evidence established that they both worked 19 hours a week. Consequently, in the absence of any agreement to the contrary, or any overriding provision in an award or an enterprise agreement, each would be entitled to the pro-rata pay of a full-time line of work, calculated at 19 hours of 38 hours a week.

109 Pursuant to the express provisions of the 2004 contracts of employment, both employees are entitled to pro-rata annual salary, annual leave, long service leave and personal/carer's leave: tab 14, AB 123 – 124. Also, ordinary hours are expressly not to exceed 76 hours per fortnight: tab 14, AB 128.

110 Whilst the Commission is not a court of pleadings, it is notable that this analysis is consistent with the matters stated in the particulars of claim attached to each application referring the claims under s 29(1)(b)(ii) of the Act. In particular, it is stated that Ms Gartside and Ms Joyce were employed as permanent part-time employees to work 19 hours per week at a rate of pay of $24.09 per hour: tab 3, AB 11.

111 When regard is had to all of these matters, it is clear that the job-share arrangements of Ms Gartside and Ms Joyce can be properly characterised as part-time employment. It could be argued however that the job-share arrangements were different positions to the positions held by Ms Gartside and Ms Joyce in 2004. However, even if that is so, it is not material as pursuant to the express terms of the 2004 contracts, the terms and conditions set out in the 2004 contracts continued to apply to any other positions unless otherwise amended in writing: tab 15, AB 130. It is notable that there was no evidence before the Commission that there was any agreement made in writing by the parties which applied the job-share arrangements.

112 Pursuant to the Hours of Duty clause in each contract of employment, the maximum ordinary hours were not to exceed 76 hours a fortnight, and rostered hours and pattern of work were initially a minimum of 20, and a maximum of 30, covering a seven day, 24 hour rotational roster. Changes to this pattern of work could be made on a minimum of seven days' notice. The initial rostered hours were 'based on current operational requirements'. In the event of 'operational requirements being varied', a minimum of seven days' notice of changes to the pattern of work is to be given in writing.

113 Whilst it could be argued that changes could only be made to the seven days, 24 hours rotational roster, as that roster was the pattern of work, such a construction is inconsistent with the fact that the Hours of Work clause expressly only set an initial minimum of 20 hours a week and a maximum of 30 hours a week. Thus, the words 'rostered hours and pattern of work' must be read together. When read together, unilateral notice is authorised to be given by Qantas Airways to change both the number of minimum and maximum hours of work a week (up to a maximum of 76 hours a fortnight) and the pattern of working those hours. However, the pre-condition to unilateral notice being given is that there must be a variation in the operational requirements of Qantas Airways.

114 It is not suggested in these appeals that the job-share arrangements were entered into by notice being given pursuant to the provisions of the Hours of Work clause. When regard is had to the relevant facts of these matters, such a contention would not, in any event, have any merit. The job-share arrangements were offered by Qantas Airways to Ms Gartside and Ms Joyce as a result of Ms Gartside, Ms Joyce and other employees of Qantas Airways making a request of Qantas Airways to introduce job-share arrangements.

115 Discussions about the arrangements for job-share positions commenced in late November 2007 with the ASU and employees of Qantas Airways seeking the job-share positions. It is apparent that Qantas Airways intended to enter into a local agreement which would set the terms and conditions of job-share arrangements offered not only to Ms Gartside and Ms Joyce, but to other employees employed by Qantas Airways at Perth Airport.

116 It is not entirely clear from the evidence whether agreement was reached between Ms Gartside and Ms Joyce and Qantas Airways in respect of all terms and conditions. However, except whether the arrangements would be permanent and ongoing or for a fixed term on secondment, it appears that this was the only material condition of the arrangements in dispute and that this issue was not resolved at any time by the parties by express agreement.

117 What was agreed was that Ms Gartside and Ms Joyce would commence in job-share arrangements from 13 January 2008 in a full-time line of work for a six month trial.

118 The offer made by Qantas Airways to Ms Gartside and Ms Joyce on 7 February 2008 was that if the six month trial was successful, they would each be offered a job-share role for a further four and a half years. It was also a condition of the offer that the terms of the job-share arrangements would be those contained in Version 14, which would be applied as a matter of policy, pending any subsequent agreement with the ASU.

119 In response to this offer, the ASU on behalf of Ms Gartside and Ms Joyce informed Qantas Airways on 8 February 2008, that its members would commence to 'act' in the positions from 13 February 2008, for a six month trial with 'an expectation to continue'. Thus, there was agreement for the job-share arrangements to commence, but was there clear rejection of the condition of fixed term or the remaining terms and conditions in Version 14? At its highest, the statement from the ASU was a clear statement to Qantas Airways that it (the ASU) was prepared to negotiate on behalf of Ms Gartside and Ms Joyce, and the other employees, in respect of the duration of the arrangements, but its position was that the job-share arrangements should be permanent and ongoing.

120 Qantas Airways puts forward an argument that it can be inferred from commencement of work in the job-share arrangements that Ms Gartside and Ms Joyce accepted the terms of the offer put by Qantas Airways on 7 February 2008. In essence, Qantas Airways puts an argument that Ms Gartside and Ms Joyce accepted the offer by their silence when commencing the job-share arrangements. Their silence, it is said, arises out of the fact that they took the benefit of the arrangements by commencing the job-share arrangement. In support of its submission, Qantas Airways relies upon the observation of McHugh JA (with whom Samuels JA agreed) in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523 in which his Honour observed (534):

> Under the common law theory of contract, the silent acceptance of an offer is generally insufficient to create any contract: *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 692 and *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1432 ; [1966] 3 All ER 128 at 131-132.

121 His Honour then went on to say:

> Nevertheless, the silence of an offeree in conjunction with the other circumstances of the case may indicate that he has accepted the offer: *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd 's Rep 334 at 340. The offeree may be under a duty to communicate his rejection of an offer. If he fails to do so, his silence will generally be regarded as an acceptance of the offer sufficient to form a contract. Many cases decided in United States jurisdictions have held that the custom of the trade, the course of dealing, or the previous relationship between the parties imposed a duty on the offeree to reject the offer or be bound: *CMI Clothesmakers Inc v ASK Knits Inc* 380 NYS 2d 447 (1975); *Brooks Towers Corporation v Hunkin-Conkey Construction Co* 454 F 2d 1203 (1972); *Alliance Manufacturing Co Inc v Foti* 146 So 2d 464 (1962). But more often than not the offeree will be bound because, knowing of the terms of the offer and the offeror's intention to enter into a contract, he has exercised a choice and taken the benefit of the offer. In *Laurel Race Course Inc v Regal Construction Co Inc* 333 A 2d 319 (1975) a contractor proposed that it would do additional work upon the basis that, if the work was the result of its defective workmanship under the original contract, there would be no charge. Otherwise the work would be charged on a cost-plus basis. The building owner made no reply to this offer. The contractor commenced work on the job to the knowledge of the building owner who was held bound by the terms of the offer. Speaking for the Court of Appeals for Maryland, Judge Levine said (at 329):
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> > "… Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable person that they were offered with the expectation of compensation, he assents to the terms proposed and thus accepts the offer."
>
> This formulation states acceptance in terms of a rule of law. However, the question is one of fact. A more accurate statement is that where an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to the tribunal of fact to hold that the offer was accepted according to its terms.
>
> (534 – 535)

122 However, President Kirby in *Emprinall Holdings Pty Ltd* approached the rule of law in a slightly different way. His Honour said that acceptance can be implied from an objective consideration of all the relevant facts and circumstances (528). He then went on to say (528):

> The circumstances in which assent may be inferred, although never specifically stated, vary with the infinite variety of facts which come before the courts in disputed contractual cases. From the facts, looked at objectively, a court may be willing to infer a party's acceptance. Various categories of cases of this kind have emerged over the years. One arises where there have been previous dealings between the parties or where something in the history of the transaction between the parties gives rise to 'an inevitable inference from the conduct' of the disputing party, and from its 'doing and saying nothing' for a considerable time, that it 'accepted the [contract] as valid'. This was the way in which the English Court of Appeal expressed its conclusion in *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334 at 340: see also discussion in *Chitty on Contracts*, 25th ed, (1983) (pars 79ff at 48) and D W Greig and J L R Davis, *The Law of Contract* (1987) at 303f.

123 It is notable that McHugh JA relied upon a number of American authorities, and Kirby P referred to the English Court of Appeal decision in *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334. Whilst none of the authorities referred to by McHugh JA or Kirby P concerned contracts of employment, the principle referred to in *Rust* by Kirby P is that where there is silence, and something in the history of the transaction between the parties gives rise to ''an inevitable inference from the conduct' of the disputing party' , it can be accepted that the terms put by the other party are valid. There are a number of English employment cases that have applied a very similar test. The test however is strict.

124 In *Solectron Scotland Ltd v Roper* [2003] UKEAT 0305_03_3107; [2004] IRLR 4 the employer argued that employees had accepted new terms of employment replacing redundancy compensation terms which were terms of the employees' contracts of employment. In particular, it was argued that the employees must be taken to have accepted the new terms (or variation) stipulated by the employers because they worked under the new terms without complaint or objection. Justice Elias rejected the argument on the grounds that the factual circumstances were such that the employees could not be taken to have accepted the variation. His Honour demonstrated how strict the test is for acceptance by conduct: At [30] he said:

> The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract containing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.

125 The *Solectron* test of conduct 'only referable' to having accepted the new terms, by continuing to work, was recently applied by the High Court of Justice, Court of Appeal (Civil Division), in *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397. In *Khatri*, the claimant was employed by the bank. Until May 2008, his contract was governed by the terms of a letter of 20 May 1998. In March 2008, the claimant was provided with a new contract in a letter of 18 March 2008 which provided for an increase in salary and changes to bonuses. These terms were agreed by the parties. There was then some discussion about redundancy. He later received another letter which sought to remove the entitlement to a bonus and impose restrictive covenants and informed him he was not going to be made redundant. The claimant did not sign the letter, nor was he pressed to do so. He continued to work, carrying out exactly the same work. A dispute arose about his entitlement to a bonus which he claimed he was entitled to by virtue of the letter of 18 March 2008 and he was then made redundant. The bank argued that the acts of continuing to work and the bank's act of not making him redundant showed acceptance of the new terms. Lord Justice Jacob, with whom Rix and Longmore LJJ agreed, found that there was no unequivocal act from which one could infer the claimant was accepting the new terms [44].

126 In *Khatri*, the terms the bank sought were disadvantageous to the claimant. In *FW Farnsworth Limited v Lacy* [2012] EWHC 2830 (Ch) new terms which were sought to be imposed by the employer were a mixture of terms that were advantageous and disadvantageous. These included a promotion, a pay rise, entitlement to a pension plan, medical benefits for the employee's family and post-termination restrictions. Although the employee did not sign the contract containing the new terms, he applied for the new benefits not previously available to him. Justice Hildyard of the High Court of Justice, Chancery Division, applied the test in *Solectron* and found that the claimant accepted the terms of the 2009 contract, as his application for the medical benefits scheme for his family in the form mandated by the terms of the disputed contract, after he had read the terms and without expressing any protest or reservation, was properly to be characterised as an unequivocal act referable only to his having accepted all of the terms [73] – [75].

127 In these matters, the job-share arrangements commenced in the week commencing 20 February 2008. At that time, there was no agreement as to the duration of the arrangements. Prior to the expiration of the six month trial of the arrangements, Ms Gartside and Ms Joyce were sent letters dated 20 May 2008 containing proposed terms of the job-share arrangements. Both letters contained a method of acceptance of the new terms which was that the employees were to sign the letters and return them to Qantas Airways. Neither employee signed the letters or was pressed to do so. Nor does it seem that they worked in accordance with the terms set out in those letters.

128 When Ms Gartside and Ms Joyce were informed by Qantas Airways in a letter dated 5 June 2009 that their job-share arrangements were finalised and that the end date of their arrangements was 19 February 2013, they both promptly gave notice to Qantas Airways that they did not accept the imposition of a condition of a fixed term: tab 45, AB 386 – 387.

129 In these circumstances, no acceptance of the offer made by Qantas Airways on 7 February 2008, or on 20 May 2008 can be inferred. Qantas Airways agreed to allow Ms Gartside and Ms Joyce to commence the job-share arrangements in circumstances where it was clearly aware that the term of duration of the arrangements was in dispute. Ms Gartside and Ms Joyce were not silent. To the contrary, they and their agents, the ASU, clearly communicated the rejection of the condition of a fixed term. In these circumstances, there was nothing in the conduct of the employees from which acceptance of Qantas Airways' terms could be taken to have occurred. Yet Qantas Airways in the face of protest by the employees did not bring the arrangements to an end at the conclusion of the six month trial. This does not mean that it can be implied from the conduct of Qantas Airways that it accepted that the job-share arrangements of Ms Gartside and Ms Joyce were permanent and ongoing. Qantas Airways made its position clear at all material times that it did not agree with such a term. In these circumstances, it is not open to imply such a term in fact.

130 When a term is implied in fact, it purports to give effect to the presumed intention of the parties in respect of a matter that they have not mentioned, but on which presumably they would have agreed should be part of the contract: *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 (102 – 103), (Gaudron and McHugh JJ). As the term in dispute was the subject of discussion on many occasions without agreement being reached, there is no scope for implying that any party accepted the other party's terms, as the term cannot be said to be a term that was not mentioned. If there was no agreement about the duration of the job-share arrangements, the question whether the contracts of employment of Ms Gartside and Ms Joyce varied by entering into the job-share arrangements squarely arises.

131 It appears from the evidence given by Ms Joyce that on entering into the job-share arrangements, their entitlement to be paid overtime was different to that specified in the 2004 contracts of employment. The 2004 contract of employment specifies that overtime is to be paid for any time worked in excess of 7.6 hours per day or 10 days per fortnight, whilst Ms Joyce's evidence was that as at 20 May 2008, if she worked more than 19 hours a week she was paid double time. Although the circumstances are not known as to how that entitlement was agreed and whether it was agreed that an entitlement to overtime would accrue on a different basis only whilst the job-share arrangements were in place, it does appear from this uncontradicted evidence that a variation to the overtime entitlement in the 2004 contracts of employment was given effect in 2008.

132 The question to be answered then is whether the Hours of Duty clause in the 2004 contracts of employment were varied in 2008 when the job-share arrangements were entered into. When the job-share arrangements were entered into by Ms Gartside

and Ms Joyce, they remained permanent part-time employees, yet their rostered hours and pattern of work changed. Whilst the commencement of the job-share arrangements were made by agreement and not by Qantas Airways giving a minimum of seven days' notice pursuant to the Hours of Duty clause, it does not follow that the agreement to commence the arrangements prohibits Qantas Airways from bringing the job-share arrangements to an end by giving notice under the Hours of Duty clause, providing that the pre-condition for giving notice is met.

133 The express provisions in the Hours of Duty clause allow for a variation in the roster, and the number of minimum and maximum hours of work (up to 76 hours per fortnight), providing there is a variation in operational requirements.

134 Although Qantas Airways argues that it gave Ms Gartside and Ms Joyce notice on 5 June 2009 that the job-share arrangements would come to an end on 19 February 2013 and that the notice given was expressly authorised by the Hours of Duty clause, I am not persuaded that such a finding can be made: tab 44, AB 377. Although the Hours of Duty clause expressly authorises Qantas Airways to give unilateral notice of a change in the number of ordinary hours of work, and changes to the rosters and patterns of work, such a notice would have to specify what those changes were. The letter of 5 June 2009 does not specify the changes that were to occur from 20 February 2013. Of greater importance, is that there is nothing in the letter upon which a finding could be made that the job-share arrangements would conclude on 19 February 2013 because of operational requirements.

135 However, the letter sent to Ms Gartside and Ms Joyce dated 3 December 2012 indicated that Qantas Airways would consider its operational and business requirements when it reviewed whether the job-share arrangements of Ms Gartside and Ms Joyce would be extended: tab 47, AB 393. Yet the letter sent to Ms Gartside and Ms Joyce on 27 May 2013, in which they were informed that they could not be offered a further job-share secondment, does not set out any reasons that could, in the absence of any evidence given on behalf of Qantas Airways, be properly characterised as 'operational requirements': tab 48, AB 395 – 396.

136 Notwithstanding this finding, this letter can be construed as a notification of a change to a pattern of work, in that the letter states that there was a requirement to return to the substantive position of part-time Customer Service Agent (seven day rotating shifts). Yet, the letter merely states that there has been a large number of applications from Qantas employees for a job-share secondment which exceed the number of job-share arrangements that can be accommodated. The letter does not however provide any information as to why that was so.

137 Thus, I am of the opinion that the express terms of the 2004 contracts of employment of Ms Gartside and Ms Joyce authorised Qantas Airways to provide unilateral notice to Ms Gartside and Ms Joyce to terminate the job-share arrangements. However, I am not satisfied on the evidence before the Commission that Qantas Airways has given notice to either employee that could be regarded as effective at law.

(c) Findings – terms of the contracts

138 For these reasons, I am of the opinion the following findings should have been made at first instance:

(a) The evidence did not establish to the requisite standard of proof, that the Heads of Agreement enlivened a custom and practice of engaging employees to work in job-share arrangements at Perth Airport on a permanent and ongoing basis.

(b) The Heads of Agreement was a framework agreed to by the ASU and Qantas Airways to enter into specific arrangements whereby Qantas Airways was bound to enter into negotiations with the ASU for a local agreement for job-share arrangements.

(c) There was no custom and usage that applied at Perth Airport in 2007, 2008 and 2009 that job-share arrangements entered into by employees of Qantas Airways were permanent and ongoing.

(d) The job-share arrangements entered into by Ms Gartside and Ms Joyce can be characterised as part-time employment.

(e) The 2004 contracts of employment of Ms Gartside and Ms Joyce remained on foot after they commenced working the job-share arrangements, as such arrangements were hours and patterns of work expressly contemplated by the terms of the 2004 contracts. However, these arrangements were not made by Qantas Airways giving unilateral notice pursuant to the Hours of Duty clauses in the 2004 contracts.

(f) There was one variation to the 2004 contracts of employment made sometime in early 2008 and that related to the payment of overtime. It appears from the evidence given by Ms Joyce that this variation was agreed. However, whether it was agreed that an entitlement to overtime would accrue on a different basis only whilst the job-share arrangements were in place is not known.

(g) The only term of the job-share arrangements in dispute after Ms Gartside and Ms Joyce commenced the job-share arrangements is the duration of the arrangements. At all material times, no agreement was reached in respect of this term.

(h) In the absence of express agreement or conduct by either party upon which agreement could be inferred in respect of the duration of the arrangements, it is open to Qantas Airways to unilaterally terminate the job-share arrangements pursuant to the Hours of Duty clauses in the 2004 contracts of employment as these arrangements can properly be characterised as rostered hours and a pattern of work in relation to which an express power to unilaterally vary such arrangements is vested in Qantas Airways.

(i) The evidence does not establish that Qantas Airways has given notice to terminate the job-share arrangement that is effective at law. In particular, the pre-conditions of the power to give unilateral notice to change the hours and pattern of work of Ms Gartside and Ms Joyce as provided for in the Hours of Duty clauses of the 2004 contracts of employment have not been met.

(d) Proposed order

139 Thus, I am of the opinion that grounds 1 and 4 of the grounds of appeal have been made out. I am not satisfied that grounds 2 and 3 have been made out. I do not find it necessary to consider ground 5 of the grounds of appeal as I am of the opinion that an order should be made to uphold the appeal and quash the decision of the Commission at first instance.

BEECH CC:

140 I have had the advantage of reading in advance the reasons for decision of Her Honour the Acting President. I agree with Her Honour's reasons.

141 When Ms Gartside and Ms Joyce commenced employment with Qantas Airways in 2004, their contracts of employment were in set out in letters to them, to which they each agreed. It is significant that the letters state, amongst other things, that the terms and conditions set out in the letters continue to apply to any other positions they may hold with Qantas Airways unless otherwise amended in writing.

142 Under the heading Duties and Responsibilities the letters state: 'Your initial position is Customer Services Agent (part time)' and include that they must also perform such other duties and responsibilities as may be required by Qantas Airways from time to time and that are within their capabilities and if required operationally, may be required to perform shift work or day work or any combination thereof.

143 In February 2008 their positions changed from Customer Services Agent (part-time) to Customer Services Agent (job-share). The terms and conditions of their 2004 contracts must continue to apply to their new positions of Customer Services Agent (job share) because there was no amendment in writing to their 2004 contracts of employment.

144 The hours and patterns of work in their 2004 contracts otherwise continued to apply other than for the fact that Ms Gartside and Ms Joyce worked 19 rather than 20 ordinary hours, which appears to have been an agreed variation to their 2004 contracts. I agree with Her Honour that the only term of the job-share arrangement which was in dispute was the duration of the arrangements and that there was no custom and practice that job-share arrangements at Perth Airport were permanent and ongoing. It follows that the rights of Qantas Airways on the one hand, and Ms Gartside or Ms Joyce on the other, to bring the arrangements to an end are to be found in their 2004 contracts, subject to any applicable award or EBA.

145 The Commission therefore erred in finding that it is a term of each of Ms Gartside's and Ms Joyce's contracts of employment that the job-share position occupied by them is ongoing on the basis that this term is implied into their contracts of employment based on custom and practice, and I agree that an order should issue quashing the decision at first instance.

SCOTT ASC:

Introduction

146 The Honourable Acting President has set out the background to this matter. I respectfully agree with the conclusions she has reached, but wish to briefly express my own reasons.

147 At first instance, Ms Gartside and Ms Joyce sought that the Commission find that their contracts of employment are for job sharing and orders that Qantas Airways maintain them in job-share positions in accordance with the contracts of employment.

148 There are two essential elements of the findings and conclusions at first instance. They relate to the status of the Heads of Agreement and to the original contracts of employment.

The Heads of Agreement

149 In the Reasons for Decision, the Commission at first instance made the following findings:

(1) The terms of the Heads of Agreement 'apply to the respondent's employees who work in job share positions throughout Australia, including the applicants, and the provisions contained in the HOA form the basis of any negotiations for a local agreement' [44].

(2) '[I]t is a term of the applicants' contracts of employment that their job share positions are ongoing on the basis that this term is implied into the applicants' contracts of employment based on custom and usage' [44].

(3) Job share employees who commenced in this role at Perth Airport before 2008 and whose terms and conditions of employment were subject to the terms of the Heads of Agreement have ongoing employment and not time limited written contracts of employment (see contracts of Ms Duncan and Ms Toula Meakins, Exhibits 1.3 and R1) [45].

(4) '[T]he term in the HOA that job share positions are ongoing is implied into the applicants' contracts of employment by custom and usage as this term is not contrary to any express term of an agreement between the applicants and the respondent and the terms of the HOA were relied upon and well known to job share employees and the respondent prior to 2008' [46].

(5) 'Written contracts containing a term that the applicants' job share positions were time limited were given to them by the respondent for signing and acceptance after the applicants had been working in their job share positions for over 10 months. This proposed variation to their existing contracts of employment, which I have already found were governed by the terms of the HOA at the time they commenced in their job share positions, was not accepted by the applicants and they did not sign or agree to this offer. As the terms of the HOA were not varied by agreement between the respondent and the applicants … the applicants remained in their existing ongoing job share positions' [47] (emphasis added).

150 The initial premise, referred to in (1) above, is that the Heads of Agreement applied to Ms Gartside and Ms Joyce. I find that in this regard the Commissioner erred. This is because, firstly, the Heads of Agreement was a framework agreement between

Qantas Airways and the ASU for the purpose of setting out the principles to be applied in the negotiations to be held regarding individual airports' arrangements. It did not set out terms applicable to any particular group or individual in the absence of a local agreement. No such local agreement was reached for Perth Airport.

151 Secondly, Ms Gartside and Ms Joyce were both part-time employees when they were offered job sharing arrangements. There is no indication that it was ever intended that they would be expected to, on an ongoing basis, work full-time hours. The Heads of Agreement applied to full-time staff. The circumstances of the staff for whom it set out in-principle arrangements were those who 'due to changed circumstances, find their full time hours impossible to meet'. If a job sharer's partner left or permanently changed their hours, Qantas Airways would assist the job sharer to find a new partner. If a vacant job share position could not be filled, 'the position will revert back to a full time position and the job share person will be required to work full time hours'.

152 The Heads of Agreement was merely an agreement in principle, to form the basis for individual airport agreements in respect of full-time staff.

153 Therefore, what follows from this initial erroneous premise is also in error.

154 The second premise, that the term of ongoing job-share positions is implied in Ms Gartside's and Ms Joyce's contracts of employment by custom and usage, is also in error. Firstly, it is clear that there were local arrangements elsewhere, but not at Perth Airport. Only arrangements at Perth Airport relating to part-time employees might assist in the implication of a term, provided the circumstances are sufficiently similar and other criteria are also met. In that regard, Ms Meakins' and Ms Emmans' contracts of employment were not consistent with the arrangements said to constitute the custom and usage. Further, their contracts differed from each other.

155 The tests for the implication of a term are conjunctive. They include, most relevantly, that the term must be so obvious that it goes without saying (*BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 283; 52 ALJR 20). The evidence is clear that this test could not be met. Qantas Airways' position from the commencement of negotiations for an arrangement for Perth Airport from around November 2007, to the written offers to Ms Gartside and Ms Joyce, was that there would be a fixed term to the job-share arrangements. It was one of the conditions the subject of ongoing negotiations during the six month trial period from 13 February 2008. Qantas Airways never conceded it, and it was still unresolved in September 2008. In those circumstances, it cannot be concluded that it goes without saying that the arrangement was ongoing.

156 In those circumstances, it cannot be said that ongoing job share arrangements would unhesitatingly have been agreed between the parties (*Byrne v Australian Airlines Limited* (1995) 185 CLR 410 (440)).

157 Further, it is not necessary to imply a term of ongoing job sharing for the reasonable or effective operation of those arrangements. They can operate effectively as either ongoing or for a fixed term.

158 Therefore, the second premise is also in error.

The contracts of employment

159 It is not without reservations that I conclude that the job-share arrangements were arrangements made within the existing 2004 contracts, involving changes to hours and patterns of work.

160 There are references within the documents prepared by Qantas Airways that indicate an intention to either 'transfer' or 'second' the job sharers into sharing a full-time job. They retain their part-time arrangement, but they were fulfilling a full-time line within the roster. The question arises then as to whether or not they were actually in a separate arrangement from their part-time employment. However, their original contracts, established in 2004, include that 'the terms and conditions set out in this letter continue to apply to any other positions you may hold with Qantas unless otherwise amended in writing' (Exhibit 1.1, Contract of Employment of Ms Natalie Gartside, tab 14, AB 122 – 129 at 122; Exhibit 1.2, Contract of Employment of Helen Joyce, tab 15, AB 130 – 137 at 130). Those terms and conditions were not otherwise amended in writing. The 2004 contracts continue to apply.

161 To enable Qantas Airways to unilaterally change the pattern of work, Qantas Airways is required to give proper notice of a change to the pattern of work by reference to variations to operational requirements and the changes are to be discussed with Ms Gartside and Ms Joyce. As these notice and discussion arrangements have not occurred, no change can be made. However, upon proper notice, such changes may unilaterally be made (Exhibit 1.1, Contract of Employment of Ms Natalie Gartside, tab 14, AB 122 – 129 at 128 and Exhibit 1.2, Contract of Employment of Helen Joyce, tab 15, AB 130 – 137 at 136).

162 Therefore, I find that grounds 1 and 4 are made out, and that the appeal ought to be upheld and the decision at first instance quashed.

2014 WAIRC 01216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	QANTAS AIRWAYS LIMITED (ACN 009 661 901)
	APPELLANT
	-and-
	HELEN MARIE JOYCE
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 27 OCTOBER 2014
FILE NO/S	FBA 3 OF 2014
CITATION NO.	2014 WAIRC 01216

Result	Appeal allowed and order quashed
Appearances	
Appellant	Mr H J Dixon SC (of counsel) and Mr R L Hooker (of counsel)
Respondent	Mr S A Millman (of counsel)

Order

This matter having come on for hearing before the Full Bench on 10 June 2014, and having heard Mr H J Dixon SC (of counsel) and Mr R L Hooker (of counsel) on behalf of the appellant, and Mr S A Millman (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 22 October 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT the appeal be and is hereby upheld.
2. THAT the order made by the Commission on 10 February 2014 in application B 41 of 2013 be and is hereby quashed.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

2014 WAIRC 01217

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	QANTAS AIRWAYS LIMITED (ACN 009 661 901)
	APPELLANT
	-and-
	NATALIE LEANNE GARTSIDE
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 27 OCTOBER 2014
FILE NO/S	FBA 4 OF 2014
CITATION NO.	2014 WAIRC 01217

Result	Appeal allowed and order quashed
Appearances	
Appellant	Mr H J Dixon SC (of counsel) and Mr R L Hooker (of counsel)
Respondent	Mr S A Millman (of counsel)

Order

This matter having come on for hearing before the Full Bench on 10 June 2014, and having heard Mr H J Dixon SC (of counsel) and Mr R L Hooker (of counsel) on behalf of the appellant, and Mr S A Millman (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 22 October 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders —

1. THAT the appeal be and is hereby upheld.
2. THAT the order made by the Commission on 10 February 2014 in application B 40 of 2013 be and is hereby quashed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS—Application for—

2014 WAIRC 00818

WA HEALTH - AUSTRALIAN NURSING FEDERATION - REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT) NURSES - INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 00818
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 10 FEBRUARY 2014, TUESDAY, 11 FEBRUARY 2014, WEDNESDAY, 12 FEBRUARY 2014, THURSDAY, 13 FEBRUARY 2014, FRIDAY, 14 FEBRUARY 2014, MONDAY, 17 FEBRUARY 2014, WEDNESDAY, 19 FEBRUARY 2014, FRIDAY, 21 FEBRUARY 2014
DELIVERED	**:**	WEDNESDAY, 30 JULY 2014
FILE NO.	**:**	AG 19 OF 2013
BETWEEN	**:**	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, THE PEEL HEALTH SERVICES BOARD, WA COUNTRY HEALTH SERVICE AND THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY
		Applicant
		AND
		AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
		Respondent

Catchwords	**:**	Industrial Agreement - Application for registration of an Agreement - Application for an order as to specified matters on which agreement has not been reached - Agreement to arbitrate a number of conditions in agreement - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 6, s 6(a), s 6(ae), s 6(af), s 6(c), s 6(ca), s 26, s 27(1)(k), s 30(1), s 31(4) and s 42G
		Mental Health Act 1996
		Minimum Conditions of *Employment Act 1993* s 19(3), s 19(4), s 20 and s 20A
		Public Sector Management Act 1994 s 95(1)(b)
		Public Sector Management (Redeployment and Redundancy) Regulations 1994 reg 18(4) and reg 18(5)
		Workers' Compensation and Injury Management Act 1981 cl 11(3) sch 1
Result	**:**	Order issued
Representation:		
Applicant	**:**	Ms C Reid, Mr C Gleeson and Mr D Matthews (of counsel)
Respondent	**:**	Ms V Loveridge, Ms E Hadrys and Ms F Dimostovski
Intervener	:	Mr G T W Tannin SC and Mr D Matthews (of counsel) on behalf of the Minister for Commerce

Case(s) referred to in reasons:

Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch) (2004) 84 WAIG 694

Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others (1990) 70 WAIG 3525

Reasons for Decision

1 This consent application involves the arbitration of a number of clauses to be included in the *WA Health – Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2013* (the 2013 Agreement) under s 42G of the *Industrial Relations Act 1979* (the Act).

Background

2 In November 2012 the respondent put the following log of claims to the applicant:

This claim applies to all ANF members who are Registered Nurses, Registered Midwives, Enrolled Nurses, Mental Health Nurses, Enrolled Mental Health Nurses and Nursing Assistants.

Salary

- 20% increase over three years effective from 1 July 2013.

Retention

- A retention bonus of $1000 per year for all permanent ANF members. This payment would be pro-rata for part-time employees.

Allowances

- 20% afternoon shift penalty.
- 25% Friday afternoon shift penalty.
- Night shift penalty on Sunday extending to 0730 on Monday when the Monday is a public holiday.
- Introduction of a lead apron allowance of $2 per hour.
- Increase in casual loading to 25%.
- Authorised Mental Health Practitioner allowance

Career Structure

- Two additional increments for Enrolled Nurses & Enrolled Mental Health Nurses.
- Two additional increments for Level 1.
- Two additional increments for Level 2.
- Senior Registered Nurse positions to be reclassified with the starting point being SRN 3 and all other positions adjusted up accordingly.
- Starting level for Nurse Practitioners will be SRN 8, moving to SRN 10 after 5 years of service.
- Automatic classification of Level 1.2 to those employees who have completed the EN pathway program and have worked a minimum of 832 hours.
- Automatic payment of Level 1.3 to those employees who are converting from EN and who have worked the equivalent of 5 years as an EN prior to registration as an RN.

Parking

- All ANF members will be provided with safe and secure parking.
- The Parking charges applicable to ANF members will return to the levels applicable as at 1st January 2010. Any future increases will be limited to an amount no greater than the CPI of the previous quarter as determined by the Australian Bureau of Statistics.

Leave

- ANF members can convert personal leave to annual leave.
- Purchased leave to be at the option of the ANF member.
- Deferred salary scheme to be at the option of the ANF member.
- Long Service leave accrual for all ANF members to be 13 weeks after 7 years.
- Pro rata long service leave to be available to ANF members after 5 years.
- Accrued days off to be reinstated for all ANF members who work more than 41 hours per fortnight.

Professional Development

- 5 days professional development leave for all ANF members.
- An additional 5 days leave for those ANF members who work at a facility that is greater than 300 km from Perth GPO.
- Payment of a professional development allowance of $1000 each year.

Qualification Allowance

- Qualification Allowance extended to ANF members who are employed as casuals.
- EN - Qualification allowance of 3.5% (based on the current formula) for one or more post enrolment courses of not less than 6 months duration.
- That the definition of qualification allowances be expanded to include qualifications acquired through TAFE - where they are of equivalent study time to the existing definitions.

Housing

- Review of housing availability and standards for members working in rural and remote locations.

Higher Duties

- Higher duties allowance to be paid on a daily basis - and this includes the commuted meal allowance for those required to carry a pager or other mobile communications device during their breaks.

On Call

- On call rate of $10 per hour.
- Commuted meal allowance will be paid for those ANF members required to carry a pager or other mobile communications device through their meal breaks and this allowance will attract the applicable shift or weekend loading.
- Casual nurses rostered to be on-call shall receive the appropriate overtime payments when they are recalled to work.
- On-call rostered on the day before commencing a rostered day off only by agreement with the ANF member.

Graduate Positions

There are hundreds of vacant nursing positions at the moment and this figure is set to rise significantly as record numbers of the current nursing & midwifery workforce approach retirement age.

At the same time, there are insufficient positions on graduate nursing programmes for WA graduate nurses.

As such, the HDWA will establish a working party with the ANF to resolve this paradox.

Policy

- The HDWA will work with the ANF to ensure, where practicable, there are consistent and standardised policies, practices and protocols in place across all public sector workplaces in WA.

Rural Gratuities

- Rural and Remote gratuities to be restored to the full amount with no discounts for any increase in district allowance payment.
- Rural and remote gratuities that currently exist in the Kimberley and the Pilbara be extended to Goldfields, Midwest, Esperance, Ravensthorpe, Norseman, Wheatbelt and other similar locations for all ANF members.

Workers compensation

- ANF members injured at work who require time away from work because of those injuries will be paid an amount equivalent to their normal earnings (including an average of the shift penalties and on call payments earned in the previous 13 weeks) - this provision will also apply those (sic) employees over the age of 65.

Redeployment

- Any ANF member who has their position made redundant (or has their position contracted out to the private sector) will receive 100% salary maintenance if they choose to stay working in the public sector.

(Document 4)

The Dispute

3 The applicant and the respondent had discussions after this log of claims was sent to the applicant but no agreement was reached between the parties. A number of conferences were then held in the Commission to assist the parties with negotiations for a new agreement and to deal with industrial action being taken by the respondent's members in support of its claims.

4 On 20 February 2013 the Commission issued the following interim orders and recommendation (2013 WAIRC 00089):

INTERIM ORDERS

1. THAT the Commission undertake further conferences between the parties, the first to be convened on Thursday, 21 February 2013 at 9.00 am for the purpose of the parties reporting back on a number of issues regarding the negotiation of a new Agreement and the current industrial action, in particular:

a. The ANF is to:

i. respond to the Minister as to the jurisdictions, levels and increments it says are appropriate for salary comparison purposes;

ii. advise the Commission whether the Recommendation in this matter has been accepted and acted on by members;

b. The Minister is to confirm that:

j.(sic)Parking at Graylands will remain available until it is no longer required or until agreement is reached with the ANF, which agreement will not be unreasonably withheld;

ii. Workloads (NHPPD) will remain unaltered;

iii. Whether it is able to commit to an operative date for the first pay increase of the new agreement.

2. THAT the parties meet either in conferences convened by the Commission or under the auspices of the Commission not less than twice per week, at which the parties are to be represented by their senior officers, until otherwise decided by the Commission.

3. THAT the Minister be in a position to put to the Economic and Expenditure Review Committee of Cabinet, or its equivalent at its first meeting after the State Election, a proposal for the resolution of the matter including salary increases.

4. THAT there be liberty to apply by both parties in respect of these Orders.

RECOMMENDATION

THAT the ANF by its officers and employees lift all bans currently in place, in particular bed closures, in relation to the negotiation of a new Agreement to replace the ANF Agreement and to take no further industrial action.

5 On 21 February 2013 the Commission issued the following directions (2013 WAIRC 00093):

1. THAT the applicant consider the ANF's proposal of:

(a) a minimum salary increase of 12.75%;

(b) the first part of such increase to be an increase of 5% for the first year from 1 July 2013;

(c) with no loss of conditions;

(d) if an agreement is not resolved by 30 June 2013, the dispute to be arbitrated,

and formally respond to that proposal by 10.00 am Friday 22 February 2013.

2. THAT the ANF call a meeting of its members for no later than 1.00 pm Friday 22 February 2013 and:

(a) discuss the applicant's response referred to in Direction 1; and

(b) consider the Commission's Recommendation issued on 20 February 2013.

3. THAT the parties report back to the Commission at 4.00 pm Friday 22 February 2013.

6 On 22 February 2013 the Commission issued the following interim orders (2013 WAIRC 00100):

1. THAT the ANF by its officers and employees and members is to lift all bans currently in place, in particular bed closures, in relation to the negotiation of a new Agreement to replace the *Registered Nurses and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010*.

2. THAT the ANF by its officers and employees and members take no further industrial action in relation to the negotiation of a new Agreement whilst negotiations for a new Agreement take place with the assistance of the Commission.

3. THAT the ANF by its officers and employees is to take reasonable steps to immediately inform its members about the terms of Orders 1 and 2 and direct its members to comply with these orders.

4. THAT the parties attend a conference to be convened in the Commission on Monday 25 February 2013 at 10.30 am to commence discussions about the framework, mechanism and remuneration quantum with respect to finalising the terms of a new Agreement to replace the *Registered Nurses and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010*.

4. (sic) THAT this order is to remain in force until revoked or varied by the Commission.

7 On 24 February 2013 the Premier, the Hon Colin Barnett MLA, sent the following conditional offer to the respondent (the Agreement) which was accepted by the respondent and its members on 25 February 2013:

On the instruction of the Premier, the Hon Colin Barnett MLA, I am authorized to make the following conditional offer which would form the basis of a new agreement to replace the ANF agreement due to expire on the 30th of June 2013.

This offer is made on behalf of the government noting that the government is in a period covered by the caretaker convention and as such it is conditional upon the current government being returned to office and thereby being in a position to conclude an agreement.

The conditional offer is as follows:

1. A salary increase of 14% over three years, the first part of such increase to be an increase of 5% for the first year from 1 July 2013, with a further 4% from 1 July 2014 and a further 5% from 1 July 2015;

2. There be no loss of conditions;
3. Car parking at Graylands to remain available for a period of up to two years (subject to re negotiation at that point) provided however that should the use of that car park over a 6 month period fall below an average of 100 cars then the car park at Graylands will be closed;
4. If an agreement is not resolved in relation to matters outstanding in the log of claims by 30 June 2013 (noting agreement in relation to a number of those matters), the dispute in relation to those outstanding matters shall be arbitrated.

I acknowledge confirmation of your verbal advice that you will recommend acceptance of this conditional offer at a meeting of members on Monday 25 February 2013.

I also acknowledge that you have indicated that on receipt of this letter you would confirm the arrangement and would instruct that no more bed closures would occur forthwith and the proposed strike action would not proceed. I take this as meaning that hospitals will return to normal as soon as possible.

(Document 5)

8 This application was lodged on 3 December 2013. After discussions between the parties a number of clauses remained in dispute between the parties and were referred to the Commission by the parties for arbitration pursuant to s 42G of the Act. The following table contains the claims, the applicant's costings of the respondent's claims and a summary of the reasons why the applicant opposes these claims being included in the 2013 Agreement. The respondent maintains that claims (2), (5), (14), (16), (17), (23), (24) and (25) are no cost items.

Respondent's claims		**Applicant's comments**	**Approximate cost over life of the 2013 Agreement**
(1)	An increase in the casual loading to 25% [Clause 11. - Employment Categories – (1)(a)]	Flow on across WA public sector. Private sector implications given bargaining history.	$3.92m
(2)	Reinstatement of Accrued Days Off (ADO) for part-time nurses and midwives working more than 41 hours per fortnight [Clause 11. - Employment Categories – (3)(b)] [Clause 25. - Hours of Work and Rostering – (3)(b) and (5) -consequential amendments]	No interstate precedent (primary reason for DPP MacBean to remove in 1998 s120AA arbitration).	$2.01m assuming 100% replacement
(3)	Additional increments for registered nurses at the top of the Level 1 and Level 2 classification scales and enrolled mental health nurses (EMHN) [Clause 14. - Salaries and Classifications – (2)]	A claim for additional pay increases on top of 14% contrary to the Agreement reached in February 2013.	$32.64m (includes direct and indirect salary costs)
(4)	Payment of a retention bonus for employees employed for the duration of the 2013 Agreement [Clause 14. - Salaries and Classifications – (3), (4) and (5)]	A claim for additional pay on top of the 14% contrary to the Agreement reached in February 2013. Flow on across WA public sector, no interstate precedent and no evidence provided to support the conclusion it would achieve intended purpose.	$6.63m (assuming 21.6% attrition rate over 3 year period)
(5)	Minimum classification for nurse practitioners to be Senior Registered Nurse (SRN) Level 7 [Clause 14. - Salaries and Classifications – (7)(c)]	Classification of SRNs based on work value of the position – SRN3 is the minimum.	
(6)	Authorised Mental Health Practitioners (AMHPs) to be paid a qualification allowance [Clause 19. - Qualification Allowance – (4)(a)(iii)]	AMHP is not a 'qualification' rather a voluntary role	$2.31m
(7)	Higher duties allowance to be paid on a shift by shift basis [Clause 20. - Higher Duties Allowance - (1)(a)]	Discretion already exists to approve payment on a daily basis where day by day relief of a particular position is a regular feature. Five consecutive working days is a common provision (eg PSA (sic))	$4.57m assuming 25% increase in HDA payments
(8)	Increase in the afternoon shift penalty to 20% [Clause 23. - Shift Work Allowances - (1)(a)]	Potential flow on across WA public sector. No interstate precedent or other jurisdiction has 20%.	$13.41m

Respondent's claims		Applicant's comments	Approximate cost over life of the 2013 Agreement
(9)	Increase in the Friday afternoon shift penalty to 25% [Clause 23. - Shift Work Allowances – (1)(b)]	Potential flow on across WA public sector. No interstate precedent or other jurisdiction has 25%.	$2.01m
(10)	Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday [Clause 23. - Shift Work Allowances - (4)(c)]	All hours worked paid in accordance with Clause 33. - Public Holidays on basis the day is a public holiday not a Monday. Flow on to EN Agreement (sic).	$1.04m calculated based on five Mondays
(11)	Payment of a lead apron allowance [Clause 24. - Post Mortem Allowance – (2)]	Employees currently entitled to additional time off to recover from X-ray or radium work.	$0.51m assuming 100 nurses and four hours per shift
(12)	Casual nurses on an on call roster to be paid overtime rates when recalled to work [Clause 28. - On Call and Recall]	Flow on implications (Department of Health (the Department) has sought common casual overtime provisions amongst occupational groups, to address potential ambiguity, including absorption of casual loading where overtime is payable). Casuals paid on an hourly basis.	Unable to cost
(13)	Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate [Clause 29. - Meal and Refreshment Breaks - (9)(a) and (b)]	Payment as a commuted allowance constructed at base rate. Alternative available is to submit claims per occasion pursuant to clause 29(1).	$74,000
(14)	Access to pro rata long service leave after seven years [Clause 32. - Long Service Leave – (1)]	Flow on across WA public sector. Private sector does in some cases provide early pro rata access although not based on 13 weeks after 10/7 years' service (eg SJOG (sic) and Ramsay).	$7.25m allowing for 100% replacement
(15)	Ability to cash out up to five days of unused personal leave at the end of each year [Clause 36. - Cashing Out Leave Entitlements]	Flow on across WA public sector. No interstate precedent.	$34m based on five days being cashed out and 80% taking this option
(16)	Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused [Clause 38. - Purchased Leave - 42/52 Salary Arrangement]	Not operationally viable and will compound the existing leave liability exposure. Operational requirements must be the prime consideration for approval. Interstate approval is at discretion of employer or subject to operational requirements.	
(17)	Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused [Clause 39. - Deferred Salaries Scheme for 12 Months Leave]	Not operationally viable and will compound the existing leave liability exposure. Operational requirements must be the prime consideration for approval. Interstate: approval is at discretion of employer or subject to operational requirements.	$1.38m assuming 50% increase in participation and 100% replacement

Respondent's claims		Applicant's comments	Approximate cost over life of the 2013 Agreement
(18)	If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement [Clause 45. - Professional Development Leave – (5) and (6)]	This is a claim for additional pay on top of the 14% contrary to the Agreement reached in February 2013. The 2010 Agreement facilitated accrual.	$10.93m (assumes current rate of PDL utilisation and payout to total PDL liability)
(19)	Employees to receive rural gratuity payments as well as the payment of a district allowance [Clause 59. - Rural Gratuities – Transitional Provisions – (1), (2) and (3)]	Flow on to other occupational groups in the Department – directly ENs (sic), indirectly to other groups. 2010 Agreement removed this entitlement for new employees with transition arrangements to ensure employees as at 17 June 2011 were no worse off and the value of the entitlement was maintained.	$2.57m
(20)	100% salary maintenance for redundant employees [Clause 65. - Redundancy and Redeployment – new clause]	Flow on across WA public sector.	Unable to cost
(21)	Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years [Clause 66. – Workers' Compensation – new clause]	Flow on across WA public sector.	$1.9m
(22)	Parking charges [Clause 67. – Parking – new clause]	Flow on to other occupational groups in the Department and across WA public sector. Proposed clause is not operationally viable.	Unable to cost
(23)	Establishment of a housing consultative committee [Clause 68. - Housing Consultative Committee – new clause]	Flow on to other occupational groups in the Department and across WA public sector.	No Cost
(24)	Establishment of a graduate nursing consultative committee [Clause 69. - Graduate Nursing Consultative Committee – new clause]	Not a requirement for a nurse to undertake a graduate program. Programs also require substantial support (Grad Connect). Hospitals can only manage a certain number of graduates and the Department is not the only option.	No Cost
(25)	Establishment of a policy standardisation consultative committee [Clause 70. - Policy Standardisation Consultative Committee – new clause]	The applicant in the context of administrative policies already promotes standardisation (OD & IC) (sic) – five distinct employer entities make standardisation unrealistic.	No Cost
Applicant's claims			
(26)	A change to portability and accessing pro rata long service leave provisions		
(27)	A change to parental leave provisions by creating individual clauses for maternity, adoption, other parent and partner leave and a new unpaid grandparental leave provision		

9 The applicant provided current details about nurses and midwives employed at each salary increment. These numbers exclude casuals.

Classification	FTE	Head Count	% of Total Head Count
Registered Nurse/Midwife			
Level 1.1	500.35	639	4.33%
Level 1.2	430.12	690	4.67%
Level 1.3	429.07	633	4.28%
Level 1.4	416.93	620	4.20%
Level 1.5	416.99	629	4.26%
Level 1.6	290.17	466	3.15%
Level 1.7	240.64	400	2.71%
Level 1.8	2707.69	4,889	33.09%
Level 2.1	292.15	421	2.85%
Level 2.2	285.57	406	2.75%
Level 2.3	274.86	385	2.61%
Level 2.4	1940.69	2,873	19.45%
Senior Registered Nurse			
SRN 1	20.44	35	0.24%
SRN 2	126.23	178	1.20%
SRN 3	819.27	1,065	7.21%
SRN 4	141.8	188	1.27%
SRN 5	17.61	20	0.14%
SRN 6	10.00	13	0.09%
SRN 7	74.31	94	0.64%
SRN 8	7.92	9	0.06%
SRN 9	13.76	17	0.12%
SRN 10	31.76	38	0.26%
Enrolled Mental Health Nurse			
EMHN PP 1	1.42	2	0.01%
EMHN PP 2	0.83	1	0.00%
EMHN PP 3	3.26	4	0.03%
EMHN PP 4	1.41	2	0.01%
EMHN PP 5	0.14	2	0.01%
EMHN PP 6	34.17	45	0.30%
Mothercraft Nurse			
Year 1	0.00	0	0.00%
Year 2	0.00	0	0.00%
Year 3	0.00	0	0.00%
Year 4	0.00	0	0.00%
Year 5	7.19	9	0.06%
TOTAL	**9536.75**	**14773**	**100.00%**

(extract Exhibit A1.12)

10 The applicant provided the following table summarising the items that by agreement, are to be included in the 2013 Agreement. The costs associated with these claims have also been included.

Condition summary	Cost	Comments
Salary and Classifications. Ordinary rates of pay increased by 14% during life of the Agreement. 5% from 1 July 2013, 4% from 1 July 2014 and 5% from 1 July 2015	$294.3m	Payment of the initial 5% increase from 1 July 2013 was made by way of administrative action. Shift, weekend, public holiday and related allowances were also adjusted to incorporate the 5% pay increase. Attached to this statement and marked "**NJF 96**" is a copy of Information Circular IC0147/13
Penalties, Allowances & Other	$58.5m	A number of salary related allowances have been adjusted in line with the agreed 14% increase

(extract Exhibit A1.12)

Glossary of terms

2010 Agreement	*Registered Nurses, Midwives and Enrolled Mental Health Nurses - Australian Nursing Federation – WA Health Industrial Agreement 2010*
2013 Agreement	*WA Health – Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2013*
Act	*Industrial Relations Act 1979*
ACT	Australian Capital Territory
ADO	Accrued Days Off
Agreement	Letter dated 24 February 2013 from Mr Peter Conran
AIRC	Australian Industrial Relations Commission
AHPRA	Australian Health and Practitioner Regulation Agency
AMHP	Authorised Mental Health Practitioners
ANF Survey	Public Sector Survey – January 2014 Results
CPD	Continuing Professional Development
CPI	Consumer Price Index
Department	Department of Health
EMHN	Enrolled Mental Health Nurse
FTE	Full-time equivalent
MH Act	*Mental Health Act 1996*
MCE Act	*Minimum Conditions* of *Employment Act 1993*
Minister	Minister for Commerce
NSW	New South Wales
PSM Act	*Public Sector Management Act 1994*
PSM Regulations	*Public Sector Management (Redeployment and Redundancy) Regulations 1994*
RPH	Royal Perth Hospital
SRN	Senior Registered Nurse
Support Workers Agreement	*WA Health - United Voice - Hospital Support Workers Industrial Agreement 2012*
WA	Western Australian
WACHS	Western Australian Country Health Service
WCIM Act	*Workers' Compensation and Injury Management Act 1981*

Leave for legal practitioner to appear

11 The applicant sought leave under s 31(4) of the Act to have a legal practitioner conduct all of its case at the s 42G hearing. The respondent objected to this application. After hearing from the parties the Commission granted leave for counsel to represent the applicant but only in relation to making submissions with respect to legal issues relevant to these proceedings (see 2014 WAIRC 00083).

Application by the Minister for Commerce seeking leave to intervene on behalf of the State

12 The Minister for Commerce (the Minister) sought leave for counsel to intervene in these proceedings on his behalf under s 30(1) of the Act.

13 On 5 February 2014 Mr Brian Bradley, the Director General of the Department of Commerce wrote to the Registrar providing an outline of the basis upon which leave to intervene was being sought. This email in part is as follows:

Please be advised that the Minister for Commerce has decided to seek leave to intervene in the proceedings on behalf of the State, and in compliance with regulations 19(1) and 19(2)(a) *Industrial Relations Commission Regulations 2005* and section 30(1) of the *Industrial Relations Act* 1979, hereby provides notice in writing.

In compliance with regulation 19(2)(c) *Industrial Relations Commission Regulations 2005* the grounds on which the intervention is intended are that the State has the following interests in the matter:

(1) The proper construction and application of section 6 and section 26 *Industrial Relations Act 1979* in the context of the matter before the Commission;

(2) The potential direct financial cost to the State of the matters before the Commission; and

(3) The potential for flow on of successful claims to other agencies within the public sector.

On 6 February 2014 the Minister lodged a Form 1 application seeking leave to intervene reiterating the three interests contained in Mr Bradley's email as being the basis for seeking leave to intervene.

14 The Minister's application to intervene was dealt with at the commencement of the first day of hearing on 10 February 2014. At the hearing the Minister's representative, Mr Tannin maintained that the Minster's intervention should not be limited to the interests upon which the Minister relied to seek intervention and if leave was granted the Minister expected counsel representing him to participate in all matters related to this application, including possible cross-examination of witnesses. The applicant did not oppose the Minister being granted leave to intervene in the proceedings but the respondent objected to this occurring. The respondent maintained that it is for the Commission to determine the application of s 6 and s 26 of the Act to issues relevant to these proceedings and the applicant is calling witnesses to deal with the issues of the cost of the respondent's claims and the possible flow on effects of these claims. The respondent also claimed any additional cross-examination of witnesses by counsel for the Minister would lengthen the proceedings which had already been significantly delayed.

15 After considering each party's submissions and whether the Minister had sufficient interest in the proceedings to grant leave to intervene I informed the parties that leave for a legal practitioner to appear on behalf of the Minister in these proceedings was granted however the Minister's intervention was to be restricted. I indicated that leave was granted for counsel to make submissions on legal issues relevant to this application within the context of the construction and application of s 6 and s 26 of the Act to these proceedings. Leave was also granted for the Minister to make submissions about the potential impact of the cost of the respondent's claims to the State of Western Australia (WA) and the possibility of flow on if the respondent's claims are granted, which were areas upon which the Minister relied to seek leave to intervene in these proceedings.

16 Following are my reasons for deciding to grant leave to counsel for the Minister to intervene and the basis for restricting that intervention.

17 Relevant sections of the Act are as follows:

30. Minister may intervene on behalf of State

(1) The Minister may, by giving the Registrar notice in writing of his intention to do so, and by leave of the Commission, intervene on behalf of the State in any proceedings before the Commission in which the State has an interest.

27. Powers of Commission

(1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —

…

(k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; and

18 The Commission is required under s 26 of the Act to act without regard to technicalities or legal forms. The objects of the Act include the promotion of goodwill in industry and the provision of means for preventing and settling industrial disputes with a maximum of expedition and a minimum of legal form and technicality (s 6(a) and (c)).

19 Section 31 of the Act is as follows:

31. Representation of parties to proceedings

(1) Any party to proceedings before the Commission, and any other person or body permitted by or under this Act to intervene or be heard in proceedings before the Commission, may appear —

(a) in person; or

(b) by an agent; or

(c) where —

(i) that party, person or body, or any of the other parties, persons or bodies permitted to intervene or be heard, is UnionsWA, the Chamber, the Mines and Metals Association, the Minister or the Minister of the Commonwealth administering the Department of the Commonwealth that has the administration of the *Fair Work Act 2009* (Commonwealth); or

(ii) the proceedings are in respect of a claim referred to the Commission under section 29(1)(b) or involve the hearing and determination of an application under section 44(7)(a)(iii); or

(iii) all parties to the proceedings expressly consent to legal practitioners appearing and being heard in the proceedings; or

(iv) the Commission, under subsection (4), allows legal practitioners to appear and be heard in the proceedings,

by a legal practitioner.

(2) An organisation or association shall be deemed to have appeared in person if it is represented by its secretary or by any officer of the organisation or association.

(3) A person or body appearing by a legal practitioner or agent is bound by the acts of that legal practitioner or agent.

(4) Where a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission, the Commission may allow legal practitioners to appear and be heard.

(5) The Commission may make regulations prescribing the manner in which authorisation of any agent is to be given, either generally or for a particular case.

20 The issue of granting leave to legal practitioners to appear in the Commission was considered by the Full Bench of this Commission in ***Western Mining Corporation Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others*** (1990) 70 WAIG 3525. In that matter Sharkey P noted:

> The right of audience is therefore restricted.
>
> The discretion to permit a legal practitioner to appear (i.e. a certificated legal practitioner) is to be exercised within the parameters of the Act, including those established by the objects of the Act, and, in particular, section 6(c). However, before there is even a question of whether the discretion should be exercised or not, a question of law must clearly be raised or argued, or likely to be raised or argued in proceedings before the Commission. The word 'likely' means generally speaking 'probable' (see Australian Telecommunications Commission v Krieg Enterprises Pty Ltd 27 FLR 400 at 410 per Bray CJ and Boughey v R 65 ALR 609 at 611). Thus, the prospect of there being raised unnecessary legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes, may well not be the sort of consideration which would found the exercise of discretion against a legal practitioner appearing in a matter. The Act after all is meant to provide means for settling disputes and to paraphrase section 6(c), with the maximum of expedition and minimum of legal form and technicality. One would think it would be quite infrequent, for example, for counsel to seek audience at the conciliation stage.
>
> We do not set out a comprehensive set of principles for the exercise of the discretion in the absence of substantial argument. In the end, much will depend upon the matter before the Commission. However, we think it useful to make the comments which we have made (3526).

21 Section 30 of the Act permits the Commission to grant leave to the Minister to intervene if it is satisfied that the State has an interest in the proceedings. Implicit in my decision to allow the Minister to intervene in these proceedings was my view that the Minister had demonstrated that he had a sufficient interest in this matter to grant leave for him to intervene.

22 If leave to intervene is granted, the Commission can permit intervention on such terms as the Commission deems appropriate (sees 27(1)(k) of the Act). Issues relevant to determining the nature of the Minister's intervention when he is represented by a legal practitioner include whether there is or is likely, in the opinion of the Commission, to be a question of law raised or argued.

23 When granting leave to counsel representing the Minister to appear in these proceedings I determined that it was appropriate to restrict counsel's appearance to making submissions on the issues relied on by the Minister in his application for leave to intervene as well as legal issues relevant to s 6 and s 26 considerations. I had previously determined that legal issues arose with respect to some of the matters in contest between the parties in relation to this application (see 2014 WAIRC 00083). In my view it was therefore appropriate to allow counsel for the Minister to also make submissions with respect to these legal issues. In addition, I granted leave to counsel for the Minister to make submissions regarding those matters he had already highlighted were relevant to the Minister's application when seeking leave to intervene. I restricted the appearance of counsel for the Minister to these matters given the particular circumstances of this case. This application primarily involves the settlement of an industrial dispute between the parties which the Act provides should be determined expeditiously and with a minimum of legal form and technicality (see s 6(c)). It was therefore my view that it was not appropriate to grant counsel representing the Minister leave to intervene and appear with respect to all matters relevant to these proceedings.

Evidence

Respondent's evidence

24 The respondent relies on the evidence of:

> Professor Diane Twigg. She is a registered nurse and Professor of Nursing and Head of School in the School of Nursing and Midwifery at Edith Cowan University. She has been in this position since 2009.
>
> Ms Sally Wearne. She is a registered nurse and a clinical nurse in the Cardiac Catheter Laboratory at Fremantle Hospital. She has held this position since 1996.
>
> Mr Terry Jongen. He is a registered nurse and nurse practitioner in Emergency Services at Royal Perth Hospital (RPH). Mr Jongen has been in this position since 2006.

Mr Timothy Smith. He is an SRN with the Crisis Assessment and Treatment Team at the Alma Street Centre, Fremantle Hospital. Mr Smith has been in this position since 2006.

Ms Eileen Hadrys. She is the respondent's Industrial Officer and has been in this position since 2008.

Dr Elisa Birch. She is an economist and Associate Professor in the University of Western Australia Business School in the area of economics. Dr Birch has been in this position since 2004.

Mr Michael Clancy. He is a Senior Industrial Officer with the respondent and is a registered nurse. Mr Clancy has been an industrial officer since 2006.

Mr Mark Olson. He is the respondent's State Secretary and has held this position since 1998.

Diane Twigg

25 Professor Twigg believes that retention of nurses is the most critical factor facing the health care system and addressing this issue is essential. A Health Workforce Australia report identified a projected shortage of 20,079 nurses in 2016 increasing to 109,490 in 2025 which could increase to 129,818 nurses with less reliance on migration. Nurse shortages have the potential to result in less hours of care being provided to patients by nurses, which will result in an increase in adverse events. A major strategy available to improve nurse retention is improving the practice environment in which nurses work plus conditions and this is more effective than increasing recruitment. In Professor Twigg's experience better nurse staffing and attraction and retention of nurses has been driven by the respondent's initiatives that bring focus to this complex and difficult issue.

26 Professor Twigg gave evidence that it is important to reward the value of senior nurses' work to maintain an attractive career path for nurses. The gap between the pay of senior nurses and non-nursing senior positions in the health system has recently widened. Professor Twigg stated that nursing workloads and patient outcomes are inextricably linked and if there are not enough nurses, each nurse's workload is increased. While both money and proximity to home were important factors for retaining nurses, other issues related to the work environment were pivotal in nurses' decisions about where they sought work and whether or not they continued to work in a hospital.

Sally Wearne

(11) Payment of a lead apron allowance

27 A range of procedures are performed using radiation which necessitates the wearing of protective lead aprons weighing between 3 - 5kg depending on the size and whether they have been customised to be longer and/or wider. The thyroid collar weighs another 245 grams. After a procedure nurses remove the lead apron and thyroid collar and there is usually five to 10 minutes between cases. Nurses working in the Cardiac Catheter Laboratory at Fremantle Hospital wear lead aprons during every shift for most of the shift and the only time a lead apron is not worn is if the nurse is working in recovery and in between cases. Ms Wearne stated that lead aprons are also worn in theatres, radiology and occasionally in ICU and the CCU at Fremantle Hospital. During a procedure a scrub nurse and a circulating nurse wear a lead apron for the entire procedure. Whilst the applicant tries to provide relief during longer procedures this is often difficult as hospitals may be short staffed or the relevant skill mix is not available. Attempts are made to rotate nurses through the various roles of scrub nurse, recovery nurse and circulating nurse so that everyone gets a break from wearing a lead apron but as two dedicated nurses are assigned to the recovery area for the entire shift and a relief nurse to cover breaks this leaves few nurses to cover theatres.

28 Colleagues of Ms Wearne who wear lead aprons often complain of sore necks, sore shoulders and backs. The payment of an allowance will not stop these issues presenting but will provide recognition for having to wear the aprons. Ms Wearne commented on the impact of wearing a lead gown compared to wearing protective clothing of a gown, gloves and a mask for infection control. Ms Wearne stated that the lead gown was heavier and more cumbersome and worn for lengthy periods without breaks. Ms Wearne stated that lead apron allowances are paid to nurses in Queensland ($9.96 per week increasing to $10.26 per week on 1 April 2014), New South Wales (NSW) ($1.84 per hour) and Tasmania ($2.18 per hour).

Terry Jongen

(5) Minimum classification for nurse practitioners to be SRN Level 7

29 Being a nurse practitioner is the pinnacle of clinical practice for a nurse. It is the only stream in nursing where a master's degree is compulsory and nurse practitioners are the only SRNs that have stand-alone standards for practice. Mr Jongen stated that all nurse practitioners are subject to the same legislation and undergo the same training. Mr Jongen understands that all nurse practitioners are classified at SRN Level 7 so granting this claim will maintain the status quo. Nurse practitioners are required to complete 10 hours of Continuing Professional Development (CPD) each year in addition to 20 hours required to maintain their nursing registration. Mr Jongen completes a further 20 hours of CPD to maintain his midwifery registration and he completed an ultra sound training course accredited with the Australasian Society of Ultrasound Medicine which allows him to perform his own scans on patients. Mr Jongen is currently undergoing credentialing at RPH for this and once certified he will be one of the first nurse practitioners in Australia to conduct his own ultrasounds. Mr Jongen stated that a reclassification process which he was involved in for nurse practitioners to be reclassified to SRN 7 was long and complex.

Timothy Smith

(6) AMHPs to be paid a qualification allowance

30 Mr Smith is designated as an AMHP. In this role during community assessments he determines if patients meet the criteria for referral under the *Mental Health Act 1996* (the MH Act). He completes MH Act forms, facilitates a patient's transport to an authorised facility and he ensures this process is completed maintaining a patient's dignity along with their safety and the safety of others. The process involves assessment, advising a patient they have been placed under the MH Act, attempting to convey them in the Department's vehicle and admission to hospital. When a patient refuses to co-operate, which is most of the time, police assistance is required. The AMHP's role is to contact police, arrange for their attendance then intervene with

police and convey patients to hospital. At times this process requires forced entry into people's property, physical restraint, verbal and physical abuse of clinicians and threats to his personal safety. Mr Smith has been required to attend high risk situations on multiple occasions. Within the last 12 months he has attended cases with the tactical response group and multiple assessments with a strong local police presence due to extreme risk of violence to himself, his colleagues and the community in general.

31 If AMHPs did not exist this role would be limited to medical staff such as the on call psychiatrist. In his experience Mr Smith believes that this is extremely unlikely to occur. The delay in contacting a medical practitioner to attend community assessments after hours would lead to an escalation of risk and severe harm or sentinel events would result and given the volume of assessments and actions undertaken by an AMHP it is not practical to rely on an on call psychiatrist to attend community assessments and this is why AMHPs were introduced. Mr Smith stated that an AMHP is more vulnerable in a community setting than when dealing with patients in hospitals as hospital staff is available for support and the situation is therefore easier to control. Whilst the payment of an AMHP allowance will not stop or decrease the violence and aggression AMHPs face on a daily basis it will provide the recognition AMHPs deserve for taking on this extra responsibility.

Eileen Hadrys

(1) An increase in the casual loading to 25%

32 The modern *Nurses Award 2010* provides casual employees with a loading of 25%. In the *Registered Nurses, Midwives and Enrolled Mental Health Nurses - Australian Nursing Federation – WA Health Industrial Agreement 2010* (the 2010 Agreement) there was a 50% increase in personal leave from 10 to 15 days, 13 of which are cumulative, and this is not reflected in the current casual loading. Casual employees employed under the 2010 Agreement have not received recognition of additional qualifications under the qualification allowance clause of this agreement. Casual employees employed under the 2010 Agreement do not accumulate professional development leave entitlements yet casual employees still have the same CPD requirements as permanent employees under the Australian Health and Practitioner Regulation Agency (AHPRA) and the Nursing and Midwifery Board of Australia. Casual employees will still be cheaper to employ with this increase as permanent employees are paid overtime rates when recalled to work. Permanent employees are also entitled to breaks and are paid an on call allowance

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

33 This is a no cost item as this claim arises from employees undertaking additional work for which they are not paid. The time taken as leave has therefore already been worked and accumulated by the employee. Other industrial agreements to which the applicant is a party covering employees such as support workers, enrolled nurses and assistants in nursing allow for employees who work 16 hours or more to accrue ADOs. The *WA Health - Health Services Union - PACTS - Industrial Agreement 2011* also does not prevent or limit part-time employees from accessing these arrangements.

(6) AMHPs to be paid a qualification allowance

34 This allowance is not a claim for undertaking training to do this role and as numerous responsibilities are placed on persons undertaking the AMHP role an allowance should recognise this. AMHPs refer persons suspected of having a mental illness who need to be examined by a psychiatrist and AMHPs may refer people who they suspect on reasonable grounds should be made an involuntary patient for an examination by a psychiatrist. Mental health practitioners who accept nomination as an AMHP attend a three day training programme and AMHPs then arrange supervision within their mental health service in order to maintain competent practice. Twice a year AMHPs report to the Chief Psychiatrist about their activities and inactive AMHPs can be removed from the register of AMHPs. The industrial agreement covering nurses and midwifes in the Australian Capital Territory (ACT) includes an all-purpose allowance for Mental Health Officers who undertake duties similar to those of an AMHP and this allowance is paid in addition to any qualification allowance to which that employee may be entitled. If nurses do not volunteer to become AMHPs the Department would need to rely on medical practitioners to perform this function which would increase costs.

(7) Higher duties allowance to be paid on a shift by shift basis

35 Currently employees are paid a higher duties allowance after working five consecutive days or more in a position classified as higher than their substantive position. Due to the volatile nature of shift work in nursing, staff may work in such a position on a regular basis but not meet the requirements of working five consecutive working days or more and it will only be if nurses are paid a higher duties allowance on a shift by shift basis that this additional responsibility will be recognised and appropriately remunerated. The 2010 Agreement provides that an employee required to temporarily undertake for the whole of a shift the full duties of a position classified at SRN Level 1 to 4 will receive the appropriate higher duties allowance for that shift. As the majority of registered nurses employed by the Department are at Level 1, it is most likely that they will be acting up in a registered nurse Level 2 capacity, which would currently require them to work in the position for five consecutive days or more to be paid the higher duties allowance. As the additional responsibility for higher duties is recognised on a shift by shift basis for those working as an SRN Level 1 to 4, the respondent's claim should be granted. The applicant's industrial agreement covering enrolled nurses and health workers allows higher duties to be applied without these employees acting in a higher role for five days. It is reasonable to expect that if you are working in a higher position and completing the duties and demands of that position, that you be remunerated at that position's rate for the duration of that work.

(11) Payment of a lead apron allowance

36 Nurses wear a lead apron when operating X-ray equipment or working with radium. These aprons are heavy and uncomfortable particularly when worn over extended periods of time. An hourly allowance should be paid to compensate for these unfavourable working conditions. In addition to an allowance being paid in NSW employees are not required to wear an

apron for more than one hour without being allowed a paid break of 10 minutes and in the Northern Territory employees are not to wear lead aprons for more than one hour without a 10 minute break.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

37 A casual employee who is recalled to work for any purpose is currently paid the casual rate of pay and if this work is cancelled the employee is paid for a minimum period of two hours. The respondent's claim is that casual employees recalled to work for any purpose will be paid a minimum of three hours at the appropriate overtime rate as currently applies to permanent staff. Employees recalled to work are given short notice of the need to attend work as well as uncertainty as to the length of the required work which makes it difficult for casual employees to plan and balance their workloads and commitments. Permanent employees have protections in relation to required breaks and casuals are cheaper to recall than permanent employees. The respondent claims there is a pool of unofficial permanent casuals who have been working similar if not the same roster for an extended period of time and are often used on an on call basis.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

38 The respondent is seeking to have the commuted meal break allowance provided for in clause 29 of the 2013 Agreement attract shift and weekend penalty rates to ensure that SRNs are appropriately remunerated for the time they work and to treat them equitably with colleagues. When Level 1 and Level 2 registered nurses are unable to take their meal break and are held on call in the hospital they are paid for their ordinary working hours as well as a shift loading or weekend penalty rates for that time. SRNs are disadvantaged as they are not paid these allowances. Ms Hadrys agreed that SRNs can be paid penalty rates if they elect to be paid under clause 29(1) of the 2010 Agreement. However, if they choose this option they have to apply on a daily basis for payment for working a meal break which is cumbersome and if disputed a nurse must use the 2010 Agreement dispute settlement procedure.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

39 An employee can request to take a reduced salary spread over 52 weeks to purchase up to 10 additional weeks of leave per year. This is therefore a no cost item. The opportunity to do this is dependent on the operational requirements of the employee's department which includes the availability of suitable leave cover, cost implications, impact on client/patient service requirements, impact on the work of other employees and the employee's existing leave liabilities. The respondent wants to include a provision that the applicant not unreasonably withhold agreement to a request to purchase leave and that should leave be denied reasons for doing so be provided in writing. The respondent is also seeking to remove the reference to the 'operational requirements' set out in clause38(1)(e) of the 2010 Agreement from the 2013 Agreement.

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

40 Employees may request to enter a salary arrangement over a five year period whereby for four years the employee is paid 80% of their ordinary salary and the unpaid component accrues over the four years and is paid out in equal instalments during the fifth year. This arrangement is therefore a no cost item. The applicant's agreement is subject to factors including operational requirements. The respondent's claim is that the applicant not unreasonably withhold agreement to a request for purchased leave and that should leave be denied those reasons be provided in writing. As the applicant is on notice when the deferred salary agreement is to fall due the applicant has adequate time to recruit appropriate replacement staff. As it is for a period of 12 months fixed term contract employees can be used for this leave. A number of nurses wish to have this leave but have had their requests denied. The addition of a review or appeal process will demonstrate to employees that their application will not be unreasonably refused and better access to this provision will assist in retaining valuable staff.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

41 All nurses and midwives on the nurses and midwives registers are required to participate in at least 20 hours of CPD per year and registered nurses and midwives who hold scheduled medicines endorsements must complete at least an additional 10 hours of CPD each year. Currently employees receive two days of professional development leave when they commence employment and a further two days of this leave on the completion of each period of 12 months service which is pro rata for part-time employees. Unused portions of professional development leave accrue from year to year. The claim is that when an application for professional development leave is denied the leave is paid out and this payment can then be used, for example, to access online education and CPD in other forums. The respondent's recent survey on leave access found that only 35.42% of nurses who responded were able to access their full professional development leave entitlement each year.

(22) Parking charges

42 The respondent wants staff parking charges to be restricted to the rates which applied on 1 January 2010 with annual increases after that date to be in line with the Consumer Price Index (CPI). Shift workers often cannot use public transport due to shift start and finish times being in the evening or early morning. Some employees also have before and after work obligations.

43 Whilst the Department has decreased the staff parking charges from their original proposals, there has still been an exponential increase in these costs, particularly for category 'A' hospitals such as RPH, Sir Charles Gairdner, Fiona Stanley and the new children's hospital. Given the increases imposed to date and the proposed increases up to 2017, for the period May 2009 to the expected increases to 1 July 2017 there will be an increase in parking fees for staff at RPH of 206%, Sir Charles Gairdner Hospital of 400% and Fremantle Hospital is 681%. These increased costs are not sustainable for staff and are not being matched by salary increases. Future increases in line with CPI ensures that nurses and midwives will be able to afford to continue to park at their workplace and future pay rises will not be absorbed by this cost.

(26) A change to portability and accessing pro rata long service leave provisions

(27) A change to parental leave provisions by creating individual clauses for maternity, adoption, other parent and partner leave and a new unpaid grandparental leave provision

44 The applicant's claims will cause a loss of conditions. The applicant wishes to reduce the portability of long service leave between the Commonwealth and other states and to remove access to pro rata long service leave where an employee has completed not less than three years continuous service and resigns because of pregnancy or participation in an in vitro fertilisation programme. Proposed parental leave changes will result in a loss of entitlements as the applicant proposes that nurses and midwives are required to provide an eight week notice period of their intention to proceed on parental leave and the current provision is for a four week notice period.

Elisa Birch

45 Dr Birch assessed how the WA economy compares with the national economy based on key economic indicators of economic growth, employment growth, earnings growth, inflation and housing prices. She stated that the WA economy has outperformed the Australian economy over the past 20 years where state growth is measured in Gross State Product. In the past decade in particular the average rate of economic growth for the WA economy has been over 8% compared to only 5% in Australia over the period of 2003 – 2013. In 2013 the WA economy contributed 16.6% of the Gross Domestic Product which represents a 27% increase from the amount the WA economy contributed to the economic growth of Australia in 1991. Employment growth has also been considerably stronger in the WA economy compared to the rest of Australia. The WA economy has had higher labour force participation rates than the Australian economy over the past three decades and the WA economy has generally had lower levels of unemployment than the Australian economy as a whole over the past ten years. Wage growth in WA in the past twenty years has been stronger than the national average. There has been little difference in the annual inflation rate for the WA economy and the Australian economy over the past five years yet the cost of living is slightly higher in WA than for Australia as a whole. In summary, the WA economy has outperformed the Australian economy in terms of economic growth, employment growth and wage growth. The West Australian economy has higher levels of labour force participation and lower levels of unemployment than the national average and the real wages of men and women in WA have grown at a faster rate than those throughout the rest of Australia. One study, which reviewed eight economic indicators of economic growth, retail spending, equipment investment, unemployment, construction work completed, population growth, housing finance and dwelling commencements for each state and territory in Australia, found that the WA economy was the best performing economy in Australia. In reaching her conclusions Dr Birch did not consider the state of the WA Government's budget or its debt levels.

46 Wage growth in WA is considerably behind that of house pricing growth. This may imply that whilst wages, including real wages have increased in WA, earnings growth is not matched with rising housing prices. It also may be indicative of the cost of living being higher in WA than for Australia as a whole.

47 Dr Birch gave evidence that if the respondent's claims are granted this could assist in reducing the gender wage gap in WA. The gap between the labour force participation rates in WA is greater than the rest of Australia and men living in WA have higher earnings than the average earnings of men in Australia. In 2013 the difference in the earnings of men living in WA and Australia as a whole was 17%. The earnings of WA women are similar to the average earnings of Australian women. In 2013 women working full-time in WA had earnings that were equal to 73.1% of male full-time earnings and this gap has widened over the past two decades. A study by Preston A, 'The Structure and Determinants of Wage Relativities: Evidence from Australia' (2001) examined the gender wage gap by each state of Australia. This study found that men and women living in WA have one of the highest unexplained earnings gap compared to other states of Australia and women living in WA were found to have earnings 17.6% lower than the earnings of their male counterparts. This unexplained wage gap was around one-third larger than the average unexplained earnings gap for the whole of Australia of 12.9%. This result implies that women living in WA face a greater degree of gender wage discrimination than women living in other states of Australia. Whilst no studies examine the earnings gap specifically for the nursing profession in Australia, a study by Birch and Li (2009) looked at earnings differentials for male and female nursing graduates. A study by Birch E and Soresi J, 'The Glass Ceiling Effect and Gender Wages Differentials: Does Industry of Employment Make A Difference?' (2014) also looked at gender wage differences by male and female dominated industries. The study by Birch and Li (2009) found that the gender wage gap among male and female nursing graduates was only 2.9% and the gender wage gap for all university graduates was 7.4%. This finding implies that nurses face little gender wage discrimination when starting out in their careers. However, as the average unexplained gender wage gap for all workers is around 10%, female nurses may face more gender wage discrimination as their careers advance. The study by Birch and Soresi (2014) found that the gender wage gap was larger for female dominated industries which nursing is a part of, than for male dominated industries. Hence, the unexplained gender wage gap in strongly female dominated industries, that is industries comprising of at least 70% female employees, was 12.1%. This gap was almost double that of the gender wage gap for strongly male dominated industries, that is industries where more than 65% of the employees were male, which was approximately 6.9%. This finding implies that there is a higher degree of gender wage discrimination in strongly female dominated industries than in male dominated industries. This study also found that the glass ceiling effect whereby a woman's career advancement has an upper limit was greater for women working in strongly female dominated industries. In summary, there is widespread evidence to suggest that women have lower earnings than men and women face a larger amount of gender wage discrimination in WA. Women working in strongly female dominated industries face higher levels of gender wage discrimination and there appears to be gender wage equity for nurses as they start their career. Women working in the Health Care and Assistance industry, of which nurses are a part of, face large raw gender wage gaps and have had very slow wages growth over the past twenty years.

48 Dr Birch disagreed with the proposition that an increase in nurses' wages would have a minimal impact on their workforce participation. Dr Birch stated that there is a large body of literature in support of the proposition that wages are a crucial determinant of labour force participation rates. An individual's decision to participate in the labour force or the hours they work is based on a comparison of the wages they receive from participating in paid employment and their reservation wage which is the value that the individual places on not working. Many studies in Australia have reported a positive association

between women's labour supply decisions and their wages. However, international studies which examined the labour supply of nurses found that labour supply is less responsive to changes in wages than other groups of women. Extrapolating on one study Dr Birch stated that it could be implied that a 10% increase in wages would result in a 3% increase in nurses' labour supply. A recent Australian study, Hanel B, Kalb G and Scott A, 'Nurses' Labour Supply Elasticities: The Importance of Accounting for Extensive Margins', (2012) (the Hanel study), found that nurses' labour supply responds more strongly to changes in earnings than what has been established in overseas literature. Dr Birch stated that there is a correlation between hours of work and nurses participation in the labour market and increases to hours worked and wages results in a higher participation rate. The Hanel study also addressed some of the shortcomings of the existing literature on the labour supply of nurses. Using data from the Household, Income and Labour Dynamics in Australia Survey this study found that nurses' labour supply responds more strongly to changes in earnings than what has been established in the overseas literature. For example the Hanel study suggests that a 10% increase in earnings would increase the number of hours worked by nurses by 13.74%. The study also found that as nurses' wages increase, non-employed women with nursing qualifications and women with nursing qualifications working in other occupations return to work in nursing occupations. Hence, the study found that if nurses' wages were increased, nurses who were not in the labour force or who are working in other occupations would return to working in the nursing profession. A key conclusion from this study was that wage policy could be used to help maintain adequate levels of nursing staff.

49 Dr Birch stated that the total wage is the relevant benchmark when making wage comparisons.

Michael Clancy

50 Mr Clancy gave evidence that in 2003 8.2% of nurses were male and the pay equity gap between nurses and other health professionals in the Department has widened in recent times, in particular in the mental health area. This has resulted in nurses moving to positions outside of nursing. The ratio of nurses to the population in 2011 was the lowest in Australia, 1,069.4 per 100,000 persons and this means that WA nurses are doing more with less.

51 Recent managerial reforms have resulted in increased levels of stress and work intensification among health professionals. Sick nurses are regularly not replaced and nurses are rotated to avoid workload complaints. Most wards have one or two nurses down on Monday morning shifts and sick nurses are often replaced with nurses who do not work a full shift. Nurses are regularly told that there is no more leave available until the end of the financial year and access to professional development leave is rare with many nurses being bullied when they request it. The addition of beds in corridors is a managerial response to ambulance ramping as a result of the four hour rule and the early removal of patients from wards is sped up through the use of the transit lounge increasing the workloads of nurses. Conditions need to be better for nurses so they stay in the nursing profession and nurses need better career prospects to encourage students to study nursing. Nursing has a bad image for prospective students because of its low pay, lack of career structure, heavy workloads and unsociable hours.

52 One of the most significant threats to the future health of Western Australians is the forecast shortage of nurses in Australia by the year 2025. Chronic nurse shortages results in poor patient outcomes. The respondent's claims which address this should be granted as they will positively impact on nurse attraction and retention which will minimise nurse shortages.

53 The respondent's Public Sector Survey – January 2014 Results (the ANF Survey) found that 12.36% of nurses who responded said they intended to leave nursing in two years, 23.32% will leave within five years and 28.96% said they would leave within 10 years. 33.15% gave retirement as the reason for leaving, 8.57% personal reasons and 20.72% gave work related reasons. The ANF Survey showed that a retention bonus would encourage 80.04% of those who responded to the survey to stay working longer and other factors that would encourage nurses to continue working were improved wages and conditions 46.85%, increased staffing levels 19.31%, improved leave 12.58% and improved career opportunities 9.22%. 57.27% of respondents said that improvements in these areas would encourage them to continue working.

54 The respondent's claims are affordable as WA's economy is in a good position. Mr Clancy relies on the 'Comsec State of the States Report 22nd July 2013 update'. It is the best performing economy in Australia and the outlook shows that there has been little slippage in the WA economy over recent times and there is currently a boost from increased activity in the housing sector. Given the strength of the WA economy there should be no effect on the economy if nurses receive the increases being sought and the government's bad budget choices should not prevent nurses from obtaining appropriate remuneration. The government has the capacity to fund the changes sought by the respondent, it is just a matter of deciding what is important for the community. It is not automatic, if the respondent's claims are granted, that the respondent's claims will flow on to other sectors.

55 Mr Clancy stated that the applicant refused to negotiate in good faith once it was served with the log of claims in November 2012. Whilst the respondent was ready to negotiate the Department was using the same tactics it used in 2010 which resulted in a delay in the 2010 Agreement being finalised and as a result nurses received a delayed wage increase. Nurses therefore resolved to take industrial action in support of finalising the 2013 Agreement. During this industrial action the respondent supported its members who were being bullied and threatened by management. Mr Clancy was unaware of any patients' lives being put at risk during the industrial action and he stated that all wards retained minimum staffing levels.

(1) An increase in the casual loading to 25%

56 Mr Clancy claims that the present loading of 20% for casual nurses does not fully compensate nurses for the benefits of not having permanent employment. Many nurses have also reported that they have been unable to gain permanent employment despite working on a casual basis for a long time. Raising the casual loading would discourage managers from relying on casual staff as a long term or cheap staffing solution.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

57 ADOs were introduced at the Department's initiative and they are a popular method of taking a stress break or dealing with family commitments. Many nurses who completed the ANF Survey said they intended to reduce their hours of work and they

would stay nursing longer if their workload was reduced by a day or two. Nurses also want the extra flexibility which ADOs give them.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

58 Mr Clancy believes that the proposed changes to the career structure will help in the attraction of nurses and reduce nurses leaving the profession. Career structure changes will ensure that WA nurses remain at the top of national wage earners which is important to attract nurses to WA. Even if it does not benefit current new graduates it is an incentive for nurses to stay working. Increasing the career structure by two increments will reduce the gap between allied heath staff and nursing staff wages and will increase the income of experienced and highly skilled nurses.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

59 A retention bonus paid after two years was seen as an incentive to stay working by 80.04% of nurses in the ANF Survey.

(5) Minimum classification for nurse practitioners to be SRN Level 7

60 All nurse practitioners are currently being paid at the SRN Level 7 rate and this claim simply reflects the status quo. Given the expanded scope of practice of nurse practitioners and the level of education they have, nurse practitioners should be classified at a minimum at SRN Level 7.

(6) AMHPs to be paid a qualification allowance

61 The applicant receives a significant financial benefit using AMHPs.

(8) Increase in the afternoon shift penalty to 20%

(9) Increase in the Friday afternoon shift penalty to 25%

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

62 Shift work in nursing is different than many other occupations and in many wards it is centred around the continuity of care model. This means that nurses are often rostered with the same patients on an afternoon shift followed by a morning shift so they can assess patients during the whole day cycle. This roster pattern is very efficient as it reduces the need for communication about the patient and promotes primary care nursing. Nursing involves a combination of heavy physical work and mental exertion of organised chaos and one of the most tiring shifts is the late evening followed by an early morning shift. The other is the occasional night shift. Nursing is a 24 hours per day, seven days a week profession and the requirement of nurses to work around the clock. The usual pattern of shifts is still 8:8:10, that is, 7.00 am to 3.30 pm, 1.00 pm to 9.30 pm and 9.00 pm to 7.30 am. Some areas including emergency departments and intensive care units have a mixture of 12 hour shifts and the normal pattern. Where there are non-permanent night shift staff, nurses are required to work all shifts and this pattern of hours is disruptive to the circadian rhythm and an employee's health.

Access to leave

63 In his role as a job representative and the respondent's industrial officer Mr Clancy has seen accessing leave being used as a punishment against nurses and dissatisfaction with leave arrangements is a significant predictor of burnout. Staff being on maternity leave, workers' compensation and long service leave is used as reasons by managers to block access to leave. The respondent has received feedback that members have recently been told that there is no leave available for the next six months to a year.

(14) Access to pro rata long service leave after seven years

64 As pro rata access to long service leave after seven years is not an increase to an employee's long service leave entitlement this is a no cost item. Nurses in the ACT and NSW receive similar pro rata access to long service leave and in many private sector agreements this provision is included. Public service employees and government officers are entitled to 13 weeks of long service leave after seven years.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

65 The National Employment Standards and *Fair Work Act 2009* and *Fair Work Regulations 2009* allow personal leave to be cashed out in certain circumstances.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

66 Many of the respondent's members have reported they have not been able to access professional development leave even though it is necessary for their registration to complete CPD of 20 hours professional development each year. If a nurse is a midwife this requirement is 40 hours a year.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

67 During the 2010 negotiations the respondent was told that all government employees would be giving up their rural gratuities allowance in return for an improved district allowance and it was on this basis that this allowance was given up by the respondent. However, this claim was untrue.

(20) 100% salary maintenance for redundant employees

68 Nurses employed at Princess Margaret Hospital and King Edward Memorial Hospital will be moving to the QE2 complex as soon as the new facilities are completed and nurses at RPH, Fremantle Hospital and Kaleeya Hospital will be moving to Fiona Stanley Hospital. The future of nurses at Swan District Hospital is uncertain as it is not known if they will be transferred to the new private Midland Health Campus. The respondent is seeking the same clause for nurses facing redeployment and/or redundancy that is enjoyed by hospital support staff in their agreement. The respondent's members at Fremantle Hospital and

RPH are concerned about their future employment after being told they will have to re-apply for their positions in a number of specialised areas. There should not be two standards of treatment for staff working side by side.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

69 The respondent is seeking to have clarified what nurses are paid when on workers' compensation. Nurses are one of the most at risk occupations in Australia, and therefore more at risk of injury, and nurses should not have to place themselves at risk of further injury because they need to return to work too early because of receiving lower than usual pay.

(22) Parking charges

70 Parking is a serious issue for the respondent's members. Nurses work shifts and have to drive to work when public transport does not operate. A WA parliamentary committee recommended that parking fee increases not take place as there was no justification for the rise. Some junior nurses have lost most of their pay increases from the 2010 Agreement as well as some of the increase gained in July 2013 due to parking cost increases.

(23) Establishment of a housing consultative committee

71 A housing consultative committee is necessary because the applicant has had a long history of problems with managing housing for its staff in remote and rural locations. The applicant acknowledges the lack of maintenance in their housing stock as a factor in the retention and attraction of nurses to rural and remote districts and the need to consider how to improve staff access to accommodation is a major contributor to the attraction and retention of staff. The Gascoyne district in particular faces challenges with quality accommodation to attract and retain appropriate staff.

(24) Establishment of a graduate nursing consultative committee

72 There are hundreds of vacant nursing positions at the moment and this figure is set to rise significantly as the current nursing and midwifery workforce approaches retirement age. At the same time there are insufficient positions on graduate nursing programmes for WA graduate nurses. A committee will assist in resolving this paradox.

(25) Establishment of a policy standardisation consultative committee

73 Policy differences between hospitals could lead to a dangerous situation for nursing practice. The need for consistent policies, guidelines and standardisation of forms and documentation are often a feature of Coronial recommendations.

Mark Olson

74 As there will be significant health workforce shortages by 2025 many of the clauses proposed by the respondent deal with the issue of attraction and retention of nurses within the WA health system. A key issue raised by the respondent's members in 2012 was attraction and retention. The ANF Survey contains the following key findings which are relevant to the respondent's claims. Of the 922 responses to this survey:

- 49.78% are aged 50 and over;
- 64.64% are planning on leaving nursing (12.36% in the next two years, 23.32% in the next five years, 28.96% in the next 10 years);
- of those planning to leave 53.87% are planning to leave due to work-related reasons (20.72%) or retirement (33.15%);
- 80.04% of nurses say a retention bonus would keep them nursing longer;
- 46.85 % say improved wages and conditions would encourage nurses to stay; and
- 57.27% say improved career opportunities, increased staff levels, improved wages and conditions and improved access to leave will all encourage nurses to stay.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

75 Mr Olson maintains that changes to the classification structure and the introduction of a retention bonus will assist in the attraction and retention of nurses and midwives. The ANF Survey confirms that 80.04% of those surveyed said that the payment of a retention bonus would keep them nursing for longer. The Department has previously used classification adjustments to provide additional wage increases and in 2001 an additional two increments for Level 1 were introduced. These claims should be granted as the applicant has found money to fund increases in other employees' wages and entitlements. For example, in the medical practitioners agreement the headline wage increase is 11% over three years. Additionally senior practitioners are receiving an additional week of professional development leave, their professional development allowance has increased by 11%, the head of department allowance has doubled and the dates for the on call rate increases have been brought forward.

(14) Access to pro rata long service leave after seven years

76 The respondent relies on the *Liberal Plan for Better Health Services* issued prior to the 2008 State Election which pledged to explore ways to attract and retain nurses in public hospitals including bringing long service leave entitlements for nurses and other hospital employees into line with other WA public sector employees.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

77 The current system penalises nurses who accrue large amounts of sick leave and favours those who regularly use their sick leave. If nurses were allowed to cash out some or all of their sick leave there would be less incentive to use sick leave before

leaving their employment, in particular before retiring. As a large number of nurses are approaching retirement in the next 10 years everything should be done to delay their retirement and maximise the number of shifts they work each fortnight. Allowing for sick leave to be cashed out assists with meeting both of these objectives.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

78 Access to these leave arrangements is an important issue for nurses and midwives. The majority of nurses and midwives work shift work (68.22% from the ANF Survey) and need breaks to ensure they do not suffer 'burn out'. These no cost items are about making it as easy as possible for nurses and midwives to access these entitlements.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

79 Reinstating rural gratuities in full will assist with the attraction and retention of nurses and midwives in rural hospitals and remove the discrimination against nurses which occurred in 2010.

Meeting held on 24 February 2013

80 Mr Olson met Mr Peter Conran on 24 February 2013 at the request of the Department of Premier and Cabinet and during this meeting only a couple of elements of the respondent's log of claims were discussed. This included the percentage of the salary increase and parking costs. The conversation was very much centred on what needed to be done to resolve the existing dispute and to put an end to industrial action. Mr Olson confirmed that the Agreement accurately reflects the agreement reached at this meeting. The offer was made up of four items being base salary increases, no loss of conditions, arrangements regarding the temporary Graylands car park and arbitration of those outstanding matters in the log of claims if not resolved by 30 June 2013. At no point in these discussions did either party suggest that the 14% wage increase settled any other claims in the log other than base salary increases. Ms Vickie Loveridge, the respondent's Senior Industrial Officer, took contemporaneous notes during this meeting which Mr Olson claims contain what was discussed. Mr Olson stated that the people attending the meeting on behalf of the Premier were aware of the existence of their log of claims and Mr Conran did not ask any questions about this log of claims. The respondent's log of claims was clear. The claim for a salary increase was in addition to other claims in the log as all of the other claim items in the respondent's log of claims have separate headings and are discrete items. It was at the Premier's initiative that the offer was made and Mr Olson maintained that the Agreement was made in good faith. After accepting the Agreement the respondent agreed to open beds and call off the proposed strike.

81 Mr Olson maintained that the applicant had a range of options open to it apart from offering to pay the 14% salary increase. The applicant could have sought a court injunction or referred the enforcement of the Commission's order that industrial action cease to the Full Bench.

82 Mr Olson stated that any action taken by the respondent's members came about due to the applicant's own inaction and inflammatory conduct which included threatening individual nurses with loss of registration.

83 Mr Olson stated that the respondent's original log of claims was sent to the applicant on 26 November 2012 as the respondent wanted to commence negotiations for a new agreement early given significant delays in the previous negotiations which resulted in this agreement not being registered until almost one year after the previous agreement expired. This resulted in a loss of back pay for the respondent's members. Mr Olson believed that the applicant was being obstructive and not prepared to negotiate the terms of a new agreement. When the respondent first met representatives of the Department on 19 December 2012 no response to their claim was put to them nor was any offer made. When the respondent met with the applicant on 29 January 2013, there was no discussion at this meeting about any wage offer. On 30 January 2013 the Department put an offer to the respondent's members of 3% per year but this was overwhelmingly rejected by the respondent's members. Bans on non-nursing duties commenced in February 2013 and as no further wage increase offer was put by the applicant the respondent's members escalated this industrial action. Mr Olson stated that during this period the respondent and its members were flexible and opened beds when requested to do so and even though industrial action was taking place the respondent continued to attend fortnightly negotiation meetings with the Department.

84 Mr Olson claimed that both parties applied industrial pressure during the dispute. Mr Olson said that during this industrial action individual employees were approached by managers about closed beds and were threatened with disciplinary action which was intimidating and threatening. Mr Olson maintained that the Director General's emails to the respondent's members contained the following threats:

- docking wages for attending the mass meeting on 18 February 2013;
- stated the Department had formal legal advice confirming an offer cannot be made during the caretaker period, when this was incorrect, and appealing to nurses to not put patient safety at risk;
- stated the respondent has no authority to close beds;
- the severe impact the bans were having on patient care;
- nurses who put patients at risk do so contrary to the Order of the Commission and put their own professional registration at risk; 'what could happen if I ignore the Orders?':
    - suspension from duty
    - disciplinary action
    - risk to registration
    - no indemnity insurance; and
- the Director General would be documenting in writing failure to comply with a lawful direction.

The respondent's members were told that they could lose their registration if they did not open beds and the Director General issued a directive that managers and directors had to take patients to wards where they knew no beds were available which put patients at risk. Mr Olson claimed that it is not unusual for unions to put pressure on governments during an election period and he cited the example of the police union using the threat of industrial action in 2011 prior to the Commonwealth Heads of Government Meeting to secure a wage offer.

85 Mr Olson claims that the two claims made by the applicant will result in a loss of conditions for the respondent's members.

Applicant's evidence

86 The applicant relies on the evidence of:

Dr Jamie Gibson. He is the Chief Psychiatrist of WA. Dr Gibson has been in this position since January 2013.

Dr Frank Daly. He is the Executive Director Royal Perth Group comprising the Wellington Street Campus, Shenton Park Campus and Bentley Health Service. Dr Daly has been in this position since November 2011.

Mr Andrew Joseph. He is the Director Budget Strategy in the Department. He has been in this position since 2013.

Ms Catherine Stoddart. She is the Chief Nurse and Midwifery Officer at the Department. Ms Stoddart has been in this position since February 2009.

Ms Kristin Berger. She is the Director of the Department of Commerce Public Sector Labour Relations Directorate. Ms Berger has been in this position since June 2013.

Mr Peter Conran. He is the Director General of the Department of the Premier and Cabinet. Mr Conran has been in this position since November 2008.

Ms Robyn Kovac. She is the Acting Director of Nursing and Patient Support Services at RPH. Ms Kovac has been in this position since October 2012.

Mr Neil Fergus. He is the Assistant Director of the Department of Health Industrial Relations Service. Mr Fergus has been in this position since August 2010.

Mr Michael Court. He is the Executive Director of the Economic Business Unit in the Department of Treasury. Mr Court has been in this position for five years.

Ms Marie Baxter. She is the Executive Director of Nursing and Midwifery Services of Western Australian Country Health Service (WACHS). Ms Baxter has been in this position since October 2011.

Ms Janet Zagari. She is the Service Co-Director at Fiona Stanley Hospital. Ms Zagari has been in this position since August 2013.

Jamie Gibson

(6) AMHPs to be paid a qualification allowance

87 To be designated as an AMHP a nurse has to have at least three years' experience in managing persons who have a mental illness which is generally achieved after three years full-time work in mental health. The names of authorised AMHPs are formally gazetted and the designation of AMHP is voluntary and currently there are 682 AMHPs of whom 578 are nurses.

88 Dr Gibson is aware that holding an AMHP designation is desirable for some nursing positions. Being an AMHP can be a professional development opportunity as that person acts as a resource for colleagues, it assists promotion and is an opportunity for skills development. AMHPs are quicker and sometimes cheaper to be deployed than using other health professionals, for example, psychiatrists. Dr Gibson stated that AMHPs perform a valuable role, they contribute to patient care, they are an important resource for their colleagues and they are a critical component within the mental health structure.

Frank Daly

89 Dr Daly gave evidence about the impact of the industrial action undertaken by the respondent's members in February 2013. This industrial action included bans on non-nursing duties and bed closures which resulted in the cancellation of elective surgery and clinical appointments at RPH. He also gave evidence about what would have occurred if strike action took place, the risk to public health services and the clinical impact of prolonged stays in the emergency department due to bans implemented by the respondent's members. When patient time in emergency departments is prolonged mortality rates of these persons increase even though nurses and clinicians do their best to mitigate against problems. Dr Daly stated that beds are routinely closed in WA hospitals and that emergency departments can be overcrowded at times, however the number of elective surgeries cancelled and beds closed during this dispute were much higher than normal.

90 Dr Daly commented on the document circulated to the Department's managers during the February 2013 dispute used to direct nurses to admit patients to a ward and outlining action to be undertaken with respect to nurses undertaking individual action. He stated that even though there were difficulties between management and nurses at times during this dispute the document's intention was to assist managers to ensure as many beds as possible remained open and for these conversations to be non-confrontational.

Andrew Joseph

91 Mr Joseph gave evidence about the cost of the respondent's claims. Mr Joseph stated that the total labour cost of registered nurses and midwives in the 2012/2013 financial year of approximately $1,579.8 million is approximately 1/3 of the Department's labour costs. The estimated funding costs arising from the headline percentage increase of 14% over three years, excluding superannuation, penalties, allowances or leave liabilities, is around $294.3 million. Mr Joseph explained the underlying assumptions on which the applicant's costs of the respondent's claims are based.

(1) An increase in the casual loading to 25%

92 The cost estimates in relation to an increased casual loading to 25% were based on casual loading payments made in the financial year 2012/2013 and an assumption that these payments are indicative of the casual loading which will be incurred over the next three years.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

93 The cost estimates in relation to the reinstatement of ADOs for nurses who work more than 41 hours per fortnight are based on an assumption that all nurses who work more than 41 hours and less than 76 hours per fortnight will elect to take ADOs. The estimates are based on the assumption that 5% of hours worked by these nurses will be converted to ADOs and 100% relief cover being provided for the ADOs taken.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

94 These salary costs comprise salary, superannuation and penalties.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

95 The cost estimates with respect to the retention bonus are based on a number of assumptions, including an assumed attrition rate of 21.6% over the life of the 2013 Agreement. The average number of full-time equivalent (FTE) nurses in the Department for the period January 2013 to March 2013 excluding casuals was used to derive the cost estimates for this claim.

(6) AMHPs to be paid a qualification allowance

96 The cost estimates for AMHPs being paid a Level 1 qualification allowance are based on 348 FTE nurses currently working as AMHPs and the payment of an annual allowance of $2,562.

(7) Higher duties allowance to be paid on a shift by shift basis

97 There is insufficient data to estimate the increase in higher duties payment which would result from payment of higher duties on a shift by shift basis. The cost estimates assume the actual payments of higher duties for 2012/2013 would increase by 25% under this claim.

(8) Increase in the afternoon shift penalty to 20%

98 The cost estimates of increasing the afternoon shift penalty from 15% to 20% were calculated on actual payments of afternoon shift penalties Monday to Friday in the financial year 2012/2013, adjusted for agreement wage increases. An assumption was also made that these payments are indicative of the afternoon shift penalties which will be incurred over the next three years.

(9) Increase in the Friday afternoon shift penalty to 25%

99 The cost estimates in relation to increasing the Friday afternoon shift penalty to 25% were based on actual payments of afternoon shift penalties in the financial year 2012/2013 adjusted for agreement wage increases. An assumption was made that these payments are indicative of the Friday afternoon shift penalty rates which will be incurred over the next three years.

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

100 The cost estimates for extending the night shift penalty on a Sunday to 7.30 am on Monday, where Monday is a public holiday, were based on the hourly rate derived from the total penalty payments on Sundays in the financial year 2012/2013 which would have been paid at the existing 75% penalty rate. The cost estimates are based on nurses working five Sunday/Monday public holiday shifts per year and being paid at the proposed higher rate for the hours between midnight and 7.30 am. The calculation uses five public holidays per year because on average the number of public holidays which fall on a Monday is five.

(11) Payment of a lead apron allowance

101 Nurses working in radiology, gastroenterology, catheterisation laboratories, theatre and other areas are required to wear lead aprons, occasionally for significant periods. There is insufficient data to estimate the number of nurses that wear lead aprons and the duration in which they wear them. The cost is based on an assumption that 100 nurses would be eligible to be paid the lead apron allowance for four hours per shift.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

102 There is insufficient data to make an informed estimate of the cost of this claim.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

103 In the financial year 2012/2013, 110 nurses were paid a commuted meal allowance. The estimated cost of commuted meal allowance attracting shift and weekend penalty payments assume that 50% of eligible nurses would be working afternoon, night or weekend shifts. Afternoon shifts are paid with a 15% penalty loading, night shifts with a 35% loading, Saturdays with a 50% loading, Sundays with a 75% loading and public holidays with a 50% loading. The estimated cost is based on an assumption that the nurses' work carried out on afternoons, nights, weekends and public holidays would be, on average, paid at a 25% loading.

(14) Access to pro rata long service leave after seven years

104 The cost estimates of pro rata long service leave being available to nurses during the first accrual after seven years of service is based on the actual number of nurses with more than seven and less than 10 years of service in the financial year 2012/2013. It is assumed that only 10% of nurses would take their full pro rata leave entitlement if this claim was granted. The estimated cost is the cost of cover for these leave periods. There could be a potential offset to this estimated cost due to the earlier

availability of long service leave because the rate of pay applicable to long service leave is the rate which applies at the time the leave is taken. It has not been possible to estimate the offset amount.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

105 The cost estimate of cashing out five days unused personal leave at the end of a year of accrual is based on the actual cost of five days unused personal leave in 2012/2013. It is assumed that 80% of nurses would take the option of cashing out five days leave per year.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

106 Costs incurred due to the time spent by nurse managers drafting written responses and reasons for declining requests for purchased leave cannot be estimated as there is insufficient data to make an informed estimate.

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

107 Cost estimates of the introduction of a requirement that the deferred salary scheme not be unreasonably refused or arbitrarily withheld are based on the actual amount of deferred payments in 2012/2013. It is assumed that the introduction of this requirement would result in a 50% increase in deferred salary arrangements and the costs are calculated based on the cost of providing cover for these periods.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

108 Cost estimates of cashing out professional development leave were based on an assumption that nurses employed in metropolitan hospitals will request their full professional leave entitlement of two days per year and that WACHS nurses will request 3 1/2 days professional development leave per year. WACHS nurses are entitled to take three days leave if they live between 200 and 400 kilometres from Perth GPO and four days if they live more than 400 kilometres away. An average of 3 1/2 days leave has therefore been used in relation to WACHS nurses. An estimate of the unused portion of professional development leave eligible to be cashed out under this option has been derived based on the amount of professional development leave taken in 2012/2013.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

109 The cost estimate of the claim for rural gratuities being restored to their full amount without any discount is based on the actual total cost of gratuities for one year prior to 17 June 2011 (the period over which they were last paid out). These costs have been escalated to allow for the new rates.

(20) 100% salary maintenance for redundant employees

110 There was insufficient data to make an informed estimate of the costs that would be incurred by such a claim being granted.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

111 Cost estimates for this claim are based on the actual workers' compensation payments for 2012/2013 and assuming 15% increase to cover costs on top of base rates. The estimated cost is based on the estimated cost if workers' compensation payments were topped up to normal earnings, including an average of the shift penalties and on call allowances for the previous 13 weeks.

(22) Parking charges

112 There is insufficient data to make an informed estimate of the costs that would be incurred by such a claim being granted.

Summary

113 Based on the costing methodology and assumptions outlined for each of the claims, the Department estimates that were all the outstanding claims granted to the respondent the estimated total cost of those claims which can be costed is around $127.2 million over the life of the 2013 Agreement. Cost estimates for the various claims do not make any allowance for likely growth in FTE numbers over the life of the 2013 Agreement, which will impact on the estimated costs. Assuming FTE growth at 2.05% for 2013/2014, 2.33% for 2014/2015 and 2% for 2015/2016 the Department estimates that were all the outstanding claims granted to the respondent the total estimated cost would be around $129.9 million over the life of the 2013 Agreement.

114 Mr Joseph confirmed that the Department and the WA Government uses the accrual method of accounting which takes into account expenses incurred such as accrued leave liabilities for which there is no immediate cash impact and the accuracy of the costs he presented was based on the best information available at the time.

Catherine Stoddart

115 Ms Stoddart gave an overview of the applicant's nursing and midwifery workforce. Sixteen percent of the nurses and midwifes workforce is under 29, 23% of nurses are aged between 30 and 39, 26% are aged between 40 and 49, 25% are aged 50 to 59 and 10% are over 60. The average age of nurses is currently 46. WA is similar to the national profile with approximately 10% of the workforce being male and 90% female. A majority of the workforce is permanent part-time, approximately 52%, with a further 21% casual and only 28% of nurses and midwives are employed on a permanent full-time basis. Nurses and midwives who are employed 1.0 FTE work 80 hours per fortnight if their contracts include shift work. For the small minority of nurses and midwives who work Monday to Friday during conventional 'office hours', 1.0 FTE equates to 76 hours per fortnight. Excluding casuals, the average contracted FTE for nurses and midwives is 0.8 which equates to 64 hours per fortnight.

116 The average FTE of agency usage in 2012/2013 was approximately 323 FTE over 12 months which is less that 2.5% of the total employed nursing and midwifery FTE within the Department. The use of this proportion of agency staff is appropriate and a key to enabling a flexible employer response to changes in staff availability and clinical workloads. It is not possible or practical to employ sufficient staff to always have enough employees to cover all contingencies, for example, short term sick leave. Using agency sourced staff allows employers to engage sufficient staff in a timely manner.

117 Attraction and retention of nurses is currently not a significant issue for the applicant. The Department's attrition rate of nurses and midwives is low and presently trending downward at approximately 3.0% per annum. In recent years a significant number of senior nurses have delayed their planned retirement and nurses have taken on more hours or moved from casual to permanent employment. There are therefore not many vacant positions for nurses and midwives in metropolitan WA at present. However, in some regional and remote areas it is harder to recruit nurses. Ms Stoddart stated that the Health Workforce Australia report predicted that there will possibly be a 20,000 shortfall of nurses by 2016 and 109,000 by 2025 and the applicant has implemented a number of strategies to deal with this issue.

(1) An increase in the casual loading to 25%

118 Increasing the casual loading risks creating an incentive that may result in part-time permanent employees electing to convert to casual employment and an increase in the casual loading is likely to increase the number of permanent nurses and midwives electing to become casuals and is likely to lead to a more expensive, fragmented and less effective workforce. During and since the global financial crisis nurses and midwives are increasingly seeking permanent contracts and greater hours of work which is beneficial to the Department as it creates a reliable and cohesive workforce. A small shift in the average per individual non-casual FTE has a dramatic impact upon the total nursing and midwifery workforce. For example, a drop from an average individual non-casual FTE of 0.8 to 0.76, which was the average individual non-casual FTE prior to the global financial crisis, would result in a loss of over 611 non-casual FTE. This would require the recruitment of more than 804 individuals to replace them. It is therefore important that the Department does not encourage casual employment to such an extent that it loses permanent staff.

119 Some of the reasons nursing staff elect to work on a casual basis are financial security, the likelihood of being offered a sufficient number of casual shifts per fortnight and non-work related lifestyle factors requiring greater flexibility at work. An overabundance of casual nurses and midwives can create service delivery and rostering difficulties. For many areas completing rosters is a challenge to accommodate individuals, particularly when the roster relies upon the participation of numerous part-time and casual staff. Establishing the availability of casual staff each fortnight is labour intensive, as casual staff do not have contracted minimum hours and their participation is less reliable than other forms of staffing because they have no obligation to cover shifts which they are not inclined to work. This means that extra pressure is placed on permanent employees to cover less popular shifts. Nurse managers' workloads are increased as they try to contact casuals and manage rostering and consistency of service delivery can be adversely affected by a roster which is staffed by a significant number of different individuals.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

120 The main reasons for the attrition of nursing staff stem from professional and personal challenges and difficult practice and work environments such as those found in remote locations that can demand longer hours of work or on call commitments. Nurses and midwives are most likely to consider leaving their current employer or the profession when they are unable to provide care and do their work to a standard they feel is appropriate. The Department is dedicated to overcoming these challenges wherever possible and to attracting and retaining nurses and midwives. Ensuring that the inflow of nurses and midwives is robust and adequate remains the Department's priority. The Department is also committed to meeting the various needs of individual staff through professional development and upskilling. Further, the Department monitors and reviews workloads and workforce metrics in order to align its strategies with professional and organisational needs. Attraction strategies include: the 'Men in Nursing' strategy, which aims to increase the headcount of male nurses in WA from around 10% to 20% by 2020; a program for year 10 students (15 - l6 year olds) to gain meaningful work experience in the public hospital system thereby gaining a more realistic and positive understanding of nursing and midwifery work; building on an existing government commitment to over $2 million per annum for scholarships to encourage the gaining of additional qualifications in areas of workforce need; annual funding of $1.5 million to site-based graduate programs to ensure the transition of graduate nurses into initial employment is a supportive and positive experience; facilitating and evolving a web-delivered, single application process for newly graduating enrolled and registered nurses and midwives to apply for initial employment in both public and private sector facilities; developing aboriginal cadetships aimed at increasing the number of aboriginal students completing nursing studies and supporting an Assistant in Nursing workforce via the traineeship program which is an effective third pathway into a nursing career. The Nursing and Midwifery Office adds to local health service based employer initiatives to help retain nurses and midwives. Initiatives which the applicant has sponsored include: a fund arising from a 2008 election commitment that has been pivotal in providing strong recognition of workload, environment, professional development, education and clinical practice development to support nurses in their workplace; a frontline leadership and management program for approximately 80 nurses per year to promote good ward/unit leadership which is vital to retaining frontline staff and managing change; innovative staff recognition programs, excellence awards, community service leave and commitment awards to recognise staff; ongoing workload reviews of nursing hours per patient day model to ensure safe working levels for nurses; and funding and initiating fellowships for research activities that have a nursing and midwifery workforce focus.

121 These initiatives are central to the Department's ability to attract and retain nurses and midwives and they reflect the applicant's commitment to growing and nurturing the nursing and midwifery workforce. The support, education and professional development opportunities offered by the Department and the focus on developing positive workplaces and recognising and rewarding performance are more effective in attracting and retaining nurses than the payment of a one-off

bonus payment. Ms Stoddart is unaware of any significant research work internationally that suggests paying a bonus to nurses would affect retention.

(6) AMHPs to be paid a qualification allowance

122 For a nurse to be considered to be designated as an AMHP they need to be registered with AHPRA and have a minimum of three years' experience in the management of persons who have a mental illness. Other than these requirements there are no additional mandatory statutory qualifications for the role of AMHP. AMHP is not a qualification as referred to in Clause 19. - Qualification Allowance of the 2010 Agreement. Clause 19(4)(a) characterises those qualifications that meet the criteria to attract the Level 1 qualification allowance. The Level 1 qualification allowance reflects a level of qualification that is academically consistent across specialties, health disciplines and jurisdictions. The payment of an AMHP allowance at a Level 1 qualification allowance would devalue the significance of the Level 1 qualification allowance as a means of encouraging and rewarding self-improvement.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

123 Ms Stoddart does not support the payment of professional development leave when this leave is not approved. Ongoing professional development is a key factor in delivering safe and competent care. Hospitals and health care facilities are assessed by way of accreditation as meeting or not meeting professional development targets as part of meeting key performance indicators. It is therefore in the Department's interests to ensure that all nurses and midwives are allowed access to their professional development leave to the full extent possible. Monetising the non-use of study leave could act as a disincentive for nurses and midwives to pursue professional development opportunities.

(24) Establishment of a graduate nursing consultative committee

124 University undergraduate nursing programs in WA have been taking on more students than previously for the last few years and are now producing more graduates. 'GradConnect' is a centralised candidate management system for newly graduating registered and enrolled nurses seeking employment within the Department. In 2013 over 848 graduates (689 registered nurses, 118 enrolled nurses and 41 midwives) were employed via the Nursing and Midwifery Office's GradConnect system.

125 Ensuring specific and sufficient funding for graduate transitioning is an important component of a long term strategy for accommodating greater numbers of graduates as they become available. The Nursing and Midwifery Office has approximately $1.5 million in annual funding to allocate toward supporting the Department's sites that provide graduate transition-to-practice employment. The funds act as an incentive for health services to include graduates within their mix of employment and this in turn helps ensure the sustainability of the nursing and midwifery workforce. The Nursing and Midwifery Office offers this funding for extra support in the form of staff development personnel for graduates thereby reducing the pressure felt by both graduates and existing ward-based staff. Ms Stoddart does not see any benefit in forming a consultative committee with the respondent on these issues. Appropriately qualified people inside the Department and at a national level are already addressing this issue and seeking broad consultation nationally.

(25) Establishment of a policy standardisation consultative committee

126 Consistent and standardised policies, practices and protocols are desirable, however, the unique demands of providing hospital services in a variety of settings, in particular regional and rural health care settings, means local flexibility is essential. Individual hospitals within the Department have appropriately responded to recommendations made by the Coroner regarding standardisation of policies and procedures using a combination of operational directives and procedures to allow consistency and flexibility across sites. The proposed involvement of the respondent in clinical policy development would not have a positive impact on these discussions.

Kristin Berger

127 The 14% increase over a three year term to be paid to nurses and midwives is higher than any wage outcome paid, or to be paid, under the government's Wages Policy 2009. The key terms of the Wages Policy 2009 were that at a minimum, public sector wages would increase by an amount equivalent to the projected growth in the Perth CPI, any increases above projected CPI growth would be linked to improved efficiency/work practice reform initiatives assessed on a case by case basis and total wage increases (incorporating both projected CPI and any additional amount for improved efficiency/work practice reform initiatives) would be capped at an amount equivalent to projected growth in the WA Wage Price Index for all sectors.

128 The 14% increase to be paid to nurses and midwives is 5.0% above the relevant CPI projections (9.0%) and 1.25% above the relevant Wage Price Index projections (12.75%):

	2013-14	2014-15	2015-16	Total
CPI	3.0%	3.0%	3.0%	9.0%
WPI	4.25%	4.25%	4.25%	12.75%

(1) An increase in the casual loading to 25%

129 The casual loading that applies under the majority of public sector industrial instruments is 20% in lieu of leave (except bereavement, unpaid carers' and parental Leave) and most allowances. This includes the applicant's industrial instruments.

130 Casual employees under public sector instruments applying a 20% casual loading generally receive shift penalties or loadings in addition to the casual loading. Given the large number of nurses, of which approximately 3,500 are casual, increasing the casual loading to 25% would result in flow on claims which have not been triggered in the past by the appearance of 25% or higher loadings in other agreements because of the limited application of those agreements and the specific circumstances in which that higher loading is payable. This could have a disproportionate impact on the Department of Education, given the

number of casual teachers utilised. It could also impact on a number of smaller agencies identified in the *State of the Sector Statistical Bulletin 2013* which rely on a employing a high percentage of casual employees.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

131 No other public sector agreement contains a generic, across the board retention payment. The inclusion of a payment for simply remaining employed for the term of the 2013 Agreement would set a dangerous precedent in agreement negotiations for other occupational groups that perform important public services. This claim appears to be for additional remuneration for undertaking the same work and responsibilities and nurses are already receiving a significant increase of 14% over three years. If this claim is granted the government could expect to receive similar claims in the course of upcoming agreement negotiations for other public sector occupational groups due to occur in 2014.

(14) Access to pro rata long service leave after seven years

132 Long service leave accrual for public sector employees generally falls into two categories. Thirteen weeks' leave after an initial period of 10 years' service, with a further 13 weeks' leave after every subsequent period of seven years' service or 13 weeks' leave after an initial period of seven years' service, with a further 13 weeks' leave after every subsequent period of seven years' service.

133 Pro rata long service leave is currently available in only limited circumstances in the public sector and it is generally only payable due to redundancy or retirement and ill-health. Early access to pro rata long service leave may also be available where employees are within seven or 10 years of their 'preservation age', that is, the age on which they are able to access their superannuation entitlements. This arrangement has been introduced to some public sector agreements as an initiative to assist employees to transition from full-time employment to retirement. It is not a standard public sector long service leave arrangement, for example, it is available to public service officers but it is not available to teachers, police and firefighters. Given the consistency of long service leave entitlements for nurses and midwives with that of other major public sector occupational groups, Ms Berger anticipates flow on claims from these occupational groups if nurses and midwives were granted pro rata long service leave after seven years' service.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

134 Public sector personal leave arrangements, including those applying to registered nurses and midwives, provide for 15 days' leave (13 days' cumulative and two days' non-cumulative) which is in excess of the leave provided by the *Minimum Conditions* of *Employment Act 1993* (the MCE Act). No other public sector employees have the capacity to cash out unused personal leave. Unlike annual and long service leave there is no capacity for unused personal leave to be paid out on cessation of employment. Given the consistency in personal leave entitlements across the public sector, the introduction of any cash out arrangement is likely to trigger flow on claims from other occupational groups. The WA Government is committed to maintaining personal leave as an entitlement to be used in the circumstances for which it has been made available including personal illness or injury, to provide care and support to a family member in need of care or support and to deal with unanticipated matters of a compassionate or pressing nature.

Peter Conran

135 In February 2013 Mr Conran had discussions with senior people within the Department about the impact of the respondent's industrial action on the WA community and he relayed this information to the Premier. On 24 February 2013 he and other senior WA Government employees had a meeting with Mr Olson to discuss the terms of an offer to avert proposed strike action and end industrial action currently taking place. Mr Olson outlined the terms of an offer and he drafted a letter to reflect those terms. At this meeting there was no discussion about any additional salary increments or the payment of a retention bonus for employees employed for the life of the 2013 Agreement. Mr Conran was not familiar with the details of the log of claims the respondent had served on the applicant but he was aware of the existence of this log. Nor did he consider the log of claims prior to meeting Mr Olson on 24 February 2013 or how the pay increase would relate to other claims of a financial nature being made by the respondent and whether these claims would impact on the agreed salary increase. Mr Conran was unaware of the potential cost of any issues that may be arbitrated when he signed the letter outlining the Agreement. The size of the pay increase was offered to avert strike action and mitigate the suffering caused by the industrial action. The final terms of the Agreement arose out of suggestions made by both parties. Mr Conran signed the letter containing the Agreement on the instructions of the Premier. After the letter containing the Agreement was given to Mr Olson on 24 February 2013 industrial action ended and the strike planned to commence on 25 February 2013 did not go ahead. Mr Conran understood that the threat of strike action and the carrying out that threat caused a change in the government's position of not putting a wage offer to the respondent. Mr Conran was aware that conditional pay offers had previously been made to unions during a WA state election campaign and he was involved in the nurses' negotiations during the 2001 election campaign when this occurred.

Robyn Kovac

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

136 Reinstating ADOs for nurses who work more than 41 hours per fortnight would present considerable operational challenges at RPH. There is currently a significant leave liability in the Department with nurses' leave liability making up a significant proportion of this liability. Consistent with government policy on reducing leave liabilities, RPH is addressing this issue and any move to allow part-time nurses access to ADOs would compound the existing leave liability problem as nurses are likely to accumulate and take ADOs rather than annual leave. It will also be necessary to allow for extra FTEs or an increase in the use of casual and agency staff in order to cover nurses on ADOs which creates a greater financial impost. RPH works hard to ensure that nurses, including part-time nurses, have every possible flexibility in their work and these arrangements help nurses manage their professional and personal obligations.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

137 Ms Kovac stated that there is no issue retaining nurses at RPH and the current average length of stay of nurses at RPH is approximately 10 years. Since the global financial crisis retention rates for nurses have been good but some areas of nursing are more difficult to attract and retain nurses. The main reasons nurses leave work is to pursue travel opportunities, further study, a move into a specialty area such as midwifery or paediatrics, retirement or a move of work location. The proposed retention bonus would therefore not reduce attrition in any significant way.

138 The applicant has worked hard putting in place systems to try and ensure that the work environment of nurses is the best it can be. A positive and supportive work environment encourages both employee performance and retention and the applicant is working hard at achieving this. Ms Kovac encourages managers to be flexible whenever possible and to allow nurses to manage their personal, family and carers obligations. This includes contract variations and rostering patterns to meet personal requirements, access to vacation care, part-time work, mothers having variable hours and twilight shifts. RPH provides pastoral support, mentoring opportunities and workplace training programmes such as the Supportive Work Environment Education and Training programme. RPH works hard at both a whole of health and a grass roots level to try and ensure that each nurse's working environment is as positive and supportive as possible. RPH provides clinical support by way of upskilling programmes and educational and training opportunities to ensure that nurses can extend their clinical and professional skills. It has a wide range of in-house professional development programmes. The flexible working arrangements, personal and professional support and training and development opportunities are fundamental to retaining nurses. These items have a far greater impact than the prospect of a payment of $1,000. Given this and the reasons why nurses leave employment, a payment of $1,000 will not make a great difference to employee retention rates. RPH is now only offering fixed term contracts to new employees given the reconfiguration of health services and the payment of the bonus will have no impact on the retention of these employees.

(8) Increase in the afternoon shift penalty to 20%

(9) Increase in the Friday afternoon shift penalty to 25%

139 Afternoon shifts are generally not the most difficult to fill. The Recorded Shift Deficit Report is a good indicator of shifts which are the most difficult to fill and according to the Annualised Recorded Shift Deficit Report, without exception at RPH, filling morning shifts is more difficult than filling afternoon shifts. There is no reason to further increase the afternoon shift penalty as there are few issues related to filling afternoon shifts. In relation to increasing the Friday afternoon shift penalty, the Shift Deficit Report indicates that Friday afternoon is not the hardest shift to fill. In 2013 of the 10 weekday morning and afternoon shifts available, six other shifts have worse deficits than Friday afternoon and all of the morning shifts are more difficult to fill than Friday afternoon at the Wellington Street campus of RPH. The deficits for the Shenton Park campus are similar and Friday afternoon at Shenton Park has the second lowest deficit of any weekday day shifts. Based on this information, Ms Kovac cannot see any reason to increase the shift penalties paid for Friday afternoon shifts. Ms Kovac has a more general concern with paying increased penalty rates for weekday day shifts. Certain shifts will always be more difficult to fill than others and increasing the penalty payments for one shift will only result in a different shift becoming difficult to fill. Over time this would result in more and more of the weekday day shifts being the subject of increased penalty payments and eventually those increases will be normalised.

(11) Payment of a lead apron allowance

140 Under the 2010 Agreement nurses who regularly engage in X-ray and radium work are allowed the necessary additional paid breaks to maintain or restore their health following that work. Beyond providing these breaks, it is not appropriate to provide any further incentives or compensation for carrying out that work. The Department works hard to ensure that it meets its occupational health and safety obligations towards all nurses and if there are outstanding concerns in relation to nurses wearing lead aprons the matter should be addressed within the occupational health and safety framework not by way of an additional allowance. A precedent would be set if payments were to be made to compensate nurses for any discomfort involved in wearing lead aprons. Nurses across many different wards and departments are required to sometimes wear uncomfortable protective equipment and engage in physically demanding tasks and if a payment was made to compensate nurses working with one particular piece of equipment or in one challenging environment, then nurses working in a multitude of different areas would likely also seek compensation for the challenges involved in their work.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

141 RPH does not routinely include casuals in its on call rosters.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

142 Applications for purchased leave from nurses are not now unreasonably refused or arbitrarily withheld and any application is considered on its merits and in the context of operational requirements. Ms Kovac is unaware of any occasions where nurses were upset about having purchased leave refused or are discouraged from making an application. The current arrangements are therefore working well. There will always be occasions where it is not possible to approve purchased leave requests and managers must be able to decline requests when operationally appropriate. If there was a significant increase in requests for purchased leave, it would compound existing leave liability issues.

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

143 Applications for access to the deferred salary scheme are not now unreasonably refused or arbitrarily withheld. Any application is considered on its merits and in the context of operational requirements. There is relatively low uptake of this scheme and Ms Kovac is not aware of any issues relating to individual nurses being refused applications for the deferred salary scheme or of nurses being discouraged from making an application for the deferred salary scheme. The system is

working well for both employees and the employer. There is a financial burden on the Department when nurses take up the deferred salary scheme as it is necessary to backfill the nurse's position during the fifth year of the arrangement.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

144 Professional development leave accrues from year to year which enables more flexible access and takes into account the need to manage the taking of this leave carefully to ensure there is adequate cover available in the absence of the person taking leave. Applications for professional development leave are approved whenever operationally possible.

145 AHPRA requires that nurses undergo 20 hours of professional development training per year in order to maintain their registration and it would not be appropriate for professional development leave requests that are denied to be paid out. It is important that even when requests for professional development leave cannot be accommodated, nurses and their line managers liaise to ensure that when at a later date it is operationally possible for the nurse to take professional development leave they are able to do so. Paying out professional development leave would operate counter to the imperative of nurses staying fully trained, up-to-date and compliant with their professional obligations. In 2013 at RPH there was a significant increase in uptake of professional development leave as compared to 2012, which demonstrates that arrangements are increasingly being made to accommodate nurses engaging in professional development.

(24) Establishment of a graduate nursing consultative committee

146 The graduate nurse programme is not mandatory and the one offered at RPH is designed to provide additional support for newly qualified nurses to assist their transition to the workforce. RPH takes on as many graduate nurses as it is able to. Hospitals can only manage a certain number of graduates and engaging more graduate nurses does not directly correlate to filling vacant nursing positions. There are positions that must be filled by more senior nurses with the appropriate skills and experience. Graduate nurses require significant support, both professionally and clinically and it is not possible to place more graduate nurses because there would not be sufficient senior nurses to mentor and manage them on the wards. Additionally, wards need to be staffed by nurses with an appropriate mix of experience and skill and hiring increased numbers of graduate nurses would adversely affect this mix and jeopardise the training and support that graduate nurses need to receive. This would be inconsistent with the obligations that arise under clause 9(4) of the 2010 Agreement and would cause unnecessary disputation.

(25) Establishment of a policy standardisation consultative committee

147 Consistent and standardised policies, practices and protocols are not necessarily appropriate given the different demands of providing hospital services in a variety of health care settings. Within RPH and South Metropolitan Health Service there is uniformity in clinical and nursing practice standards. However, the roles and resources within each health system create challenges in reaching agreement. The addition of a further committee addressing the issue of standardisation would provide no further benefit and would only burden staff already working hard on this issue. The work that needs to be done on standardising policies and procedures centres on liaising with a significant number of stakeholders in various health services, across disciplines and specialities which is already in progress. To require the people involved in this process to engage with a party only representing one of the constituent professions, and which would not be able to provide clinical insight into the various specialities, would only create more work, alienate members of other professions, lead to calls from other industrial organisations to also be a party to the discussions and would have no significant benefit.

Neil Fergus

(1) An increase in the casual loading to 25%

148 A snapshot of the estimated number of casual nurses and midwives for the month of June 2013 was FTE 754 with a headcount 3,530.

149 There is a 'multiplier effect' if the increase to 25% occurs calculated on the salaries as increased by 14%. If the claim is successful it will deliver a further pay increase to casual nurses and midwives of 4.16% over three years, that is, 18.16% over three years.

Registered Nurse/Midwife Level 1.2	Registered Nurse/Midwife Level 2.4
Base hourly rate $30.60 per hour as at 1 July 2013	Base hourly rate $42.48 per hour as at 1 July 2013
Total hourly rate - $30.60 x 20% casual loading = $36.72 per hour	Total hourly rate - $42.48 x 20% casual loading = $50.98 per hour
With 25% loading $30.60 x 25% casual loading = $38.25 per hour	With 25% loading $42.48 x 25% casual loading = $53.10 per hour
% increase = $1.53 (38.25 - 36.72) divided by $36.72 = 4.16666%	% increase = $2.12 (53.10 - 50.98) divided by $50.98 = 4.1585%

150 The payment of an increased casual loading will make working as a casual more attractive than it is currently which may affect the employment of permanent employees. A number of industrial instruments covering the Department's employees provide for a casual loading of 20%. The estimated casual FTE and headcount for the month of June 2013 for employees covered by those industrial instruments is 1,345 and 4,679 respectively. Any increase in the casual loading rate for casual nurses and midwives will lead to claims for an increase in the casual loading rate for other public sector employees and in particular the other occupational groups employed within the Department. An increase in the casual loading will be expensive. Whilst recent improvements in paid leave entitlements including enhanced personal leave, paid parental leave and access to purchased leave have been improvements for permanent employees they are insufficient to warrant an increase of another 5% on top of the current casual loading. Casual employees who are eligible because of the regular and systematic

basis of their employment over 12 months are entitled to unpaid parental leave. The loading compensates casual employees in lieu of access to paid leave entitlements, that is, annual leave, long service leave and personal leave. To the extent that an argument is made that the loading should be increased to compensate casual employees not having access to leave such as purchased leave or paid parental leave, these forms of leave are relatively new and not traditionally compensated for by casual loading payments.

151 In NSW a 10% casual loading is paid. A casual loading of 20% is paid to nurses and midwives in the Northern Territory. Tasmania increases from 20% to 22% from 1 March 2014 and then to 23% from 1 July 2014. The ACT proposes an increase from 20% to 22.5% and then to 25% on 1 July 2015. In Queensland a loading of 23% is payable for all work performed Monday to Saturday inclusive. The casual loading is not payable on a Sunday where the shift penalty of 75% is the only penalty received by casuals. In Victoria the casual loading is 25%.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

152 The 2010 Agreement provides a number of options for working ordinary hours of work. Full-time employees work an 80 hour fortnight but are paid for 76 hours with the additional four hours going toward days off. This has the benefit for full-time nurses of having additional breaks from work. The applicant considers it appropriate that full-time nurses have this ability to take additional time away from work. Part-time employees are paid for all hours worked and do not accrue an entitlement to a day off under the ADO regime in the 2010 Agreement unless the terms of clause 25(3)(b)(i) are satisfied and the engagement of agency nurses arises. Part-time employees are not able to access ADOs in any other Australian state or territory. The applicant is opposed to giving part-time employees, even those who work more than 41 hours in a fortnight, access to the ADO regime because no persuasive argument has been advanced by the respondent that the current arrangement is not working, or that additional access to time off is necessary for this group. Moreover there are operational considerations in filling the gaps created by a part-time nurse or midwife taking an ADO.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

153 The majority of registered nurses and EMHNs are at Level 1.8, Level 2.4 or Paypoint 6 respectively and the majority of these employees will have been at that level for more than 12 months as at 1 July 2014 or will achieve 12 months at that level after 1 July 2014. If the respondent's claim is granted they will receive a $20 pay increase per week on the basis of time served only on 1 July 2014 and another $20 pay increase per week on 1 July 2015. All those who come behind this cohort will also become entitled to the $20 pay increase per week in time.

154 Mr Fergus claimed that the proposed changes constitute salary increases which were satisfied by the Agreement. He believes that there are an appropriate number of increments already in place and while there must be an upper limit, bunching will occur. If this claim was granted it would equate to an additional percentage wage increase over the life of the 2013 Agreement of between 2.9% for employees currently classified at the top of Level 1.8, 4% for EMHNs currently classified at Paypoint 6 and 5.3% for employees currently classified at the top of Level 2.4.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

155 As this is a payment for time served rather than for a specific disability this is a salary claim. Even if there was a retention problem, and there is not, Mr Fergus claims that a payment of $1,000 on 30 June 2016 would not do anything significant to address a retention problem. The WA Department of Health Exit Survey Report January - June 2013 demonstrates that personal reasons are the single largest contributing factor for resignations and this is unlikely to be reversed by the prospect of receiving an additional payment of $1000.

(5) Minimum classification for nurse practitioners to be SRN Level 7

156 A nurse practitioner is a registered nurse qualified and authorised to function autonomously in an advanced and extended clinical role. There are currently 50 nurse practitioners employed within the Department and all are classified at SRN Level 7. All nurse practitioner positions are assessed in the same way as any other SRN position based on a work value assessment except that it is accepted and agreed that their classification will not be lower than SRN 3. The 2010 Agreement provides that the applicant is responsible for the determination of the appropriate classification level following a work value assessment associated with the scope of practice of the position. No evidence related to work value has been presented to support the respondent's claim that the minimum classification for the nurse practitioner position be reclassified from SRN 3 to SRN 7.

157 All nurse practitioners being engaged at the SRN Level 7 classification is not a reason to reclassify the position as a minimum SRN Level 7 position. The current clause allows appropriate flexibility to classify positions as nurse practitioner positions where the scope of practice falls below the standard of an SRN Level 7. There is an established process for the classification of positions, including nurse practitioner positions. In relation to whether it is appropriate for nurse practitioner positions to be classified lower than SRN Level 7, clause 14(7)(d) of the 2010 Agreement makes it clear that a person aggrieved by a classification may raise a dispute under the dispute resolution clause in the 2010 Agreement. Mr Fergus is unaware of any disputes being raised in relation to the assessment of the work value associated with the scope of practice of a nurse practitioner position during the life of the 2010 Agreement.

(6) AMHPs to be paid a qualification allowance

158 The respondent's proposed subclause does not specify a qualification. It refers to persons who have been appointed to a particular role. The three day course for this designation concentrates on the responsibilities of the designation under the MH Act. The process by which a mental health practitioner becomes an AMHP is not in any way comparable to the qualifications defined by clause 19 of the 2010 Agreement for which the qualification allowance is paid. The duties and responsibilities associated with the designation are performed during paid work hours. The changes proposed by the respondent do not alter the underlying principle of the clause that only the highest allowance will be payable despite a nurse or midwife being entitled to more than one of the allowances.

(7) Higher duties allowance to be paid on a shift by shift basis

159 Since 1998 the classifications currently known as SRN Level 1 to SRN Level 4 have been paid a higher duties allowance on a shift by shift basis. Other than these classifications the requirement currently is that a person is required to work in the higher classified position for a minimum period of five consecutive working days before being eligible for a higher duties allowance. This is the common and widespread requirement within the WA public sector. The higher duties allowance provision in the 2010 Agreement provides that each period of acting on higher duties, whether paid or not, will be recorded in the employee's personnel records and be recognised as experience. This assists the person in seeking promotion.

160 Since 2005 a shift coordinators allowance has been paid to registered nurse/midwife level 1 who is directed to act as a designated shift coordinator for the whole shift and the allowance provides that the person is paid at the level 2.1 rate for the whole of that single shift. Under the 2010 Agreement a level l public hospital nurse who undertakes responsibilities when there is no level 2 nurse (or higher) on duty is paid a responsibility allowance which is calculated as the difference in the base rate for the highest increment at level 1 and the first increment a level 2. The responsibility allowance is paid per shift and is most commonly paid at a number of small country hospitals where a level 1 nurse may be the senior staff member on duty. The current arrangements are fair and reasonable. Where day to day relief is a regular feature or requirement of a position a higher duties allowance is paid for a single shift or day.

(8) Increase in the afternoon shift penalty to 20%

161 If the respondent's claim is granted the afternoon shift penalty would have increased by 60% in seven years. The unsociability of this shift is already compensated for and will not make the shift easier to fill as 15% is already an appropriate incentive to nurses to work afternoon shifts. Mr Fergus is unaware of any evidence suggesting this shift is difficult to fill. Even if there was a problem that afternoon shifts are difficult to fill there is no evidence that an increase to 20% will make the shifts easier to fill.

(9) Increase in the Friday afternoon shift penalty to 25%

162 If granted, the afternoon shift penalty for Friday afternoons would have increased 100% in seven years and this shift has not become any more unsociable since 2007 when the shift penalty was last increased. Mr Fergus is unaware of the Department having difficulty filling Friday afternoon shifts and there is no evidence that a shift increase to 25% will make the Friday afternoon shift significantly easier to fill.

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

163 Public holidays are dealt with under clause 33 of the 2010 Agreement. The payment of a 50% penalty for hours worked on a Monday public holiday, even where those hours form part of a Sunday shift has been applied in accordance with clause 33 since 2001. When public holidays are worked nurses and midwives receive a day's leave in lieu of the public holiday, paid at the ordinary rate, to ensure that they have the 10 public holidays provided for in the 2010 Agreement. Currently where a nurse or midwife works a Sunday shift going into a Monday public holiday, payment of the 50% loading for the hours worked on a public holiday plus the crediting of a day's leave, which they take at the ordinary rate, means that nurses and midwives are paid at 250% for the hours worked on the Monday. That is, 100% pay for hours worked, the 50% loading and the day off at 100%. These provisions work together to provide a fair and reasonable result for nurses and midwives and the applicant and they cannot be broken apart without creating an imbalance.

164 The respondent seeks to have the Sunday shift provision apply, rather than the public holiday provision, to the loading but still take advantage of the public holiday provision in relation to the crediting of a day of leave in lieu. Mixing and matching the Sunday shift provision and the public holiday provision in this way creates an unfairness to the applicant who has negotiated and applied the public holiday provision with the parts of the public holiday provision working together as a discrete system to provide a fair and reasonable result for all parties. The public holiday clause should continue to apply as it contains internal balances that explain its particular provisions. Mr Fergus is unaware of any evidence suggesting Sunday shifts which go into Monday public holidays are difficult to staff and if this claim is granted there is likely to be a direct flow on to employees covered by the enrolled nurses and assistants in nursing industrial agreement.

(11) Payment of a lead apron allowance

165 The 2010 Agreement provides that nurses engaged in X-ray or radium work are allowed additional paid breaks to restore them to normal health following and due to the performance of such work. If problems arise from the wearing of the apron there is no reason why nurses could not be allowed additional paid breaks to address this. The entitlement to an allowance for wearing a lead apron allowance is only payable to nurses and midwives employed in the public hospital systems of Queensland ($9.96 per week or $0.26 per hour), NSW ($1.84 per hour) and Tasmania ($2.18 per hour). South Australia has a provision similar to the 2010 Agreement. In Victoria, the ACT and the Northern Territory there are no provisions regarding paid breaks or the payment of any allowance for the wearing of lead aprons.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

166 The current arrangement is that if a casual employee works longer than any given rostered shift they are paid overtime. The proposed changes seek to merge the terms and conditions of permanent and casual staff. Permanent and casual employment are completely separate modes of employment with theoretical and historical differences which are reflected in different terms and conditions of employment and these terms and conditions should not be merged without good reason. Casual employees who are on call and return to work are paid for the hours worked along with the 20% loading and they receive a minimum of two hours pay. Permanent staff are paid at overtime rates and receive a minimum of three hours pay. A casual employee does not receive the same entitlement as a permanent staff member because they receive a 20% loading for work undertaken. It is unreasonable to identify one area in which a casual employee receives a different entitlement to a permanent employee, argue it is a lesser entitlement and seek to have the entitlement match that which is extended to permanent staff.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

167 Clause 29(1) of the 2010 Agreement provides that a meal break may be taken by an SRN and that break will not be counted as time worked unless the employee is held on call during the break in which case the time will be counted in the ordinary working hours. Alternatively under clause 29(9)(a) if an SRN carries a pager while on a meal break, is rostered to remain on the hospital site for the duration of the meal break and whose meal breaks are regularly interrupted by calls to return to the ward to deal with urgent clinical matters, the SRN may receive a commuted meal break allowance. Most SRNs have chosen to have clause 29(9) apply to them on a permanent basis rather than being applied on a shift by shift basis. The commuted meal allowance under clause 29(9) is therefore paid for foregoing the entitlement to unpaid meal breaks. The employee is not being paid for work actually done but is being paid a commuted allowance so that during meal breaks, if the occasion arises, the employee will work. The applicant does not require evidence under clause 29(9)(iii) that meal breaks are regularly interrupted. The allowance relates to the giving up of a meal break not to the time or nature of the shift being worked. Clause 29(9) as it is currently drafted operates in a fair and reasonable manner. Clause 29(1) provides that if an employee is held on call within the hospital the period on call, in being counted in the ordinary working hours for that day, would attract shift and/or weekend penalty rates. However, this applies as and when the situation occurs unlike under clause 29(9) where a commuted allowance is paid on an ongoing basis. The commuted allowance should not change depending on when the shift is worked. If an SRN is of the view that there is a difference between being on call for a meal break during a night shift or weekend shift as opposed to other shifts, the SRN may opt out of the clause 29(9) provisions and revert to the scheme of unpaid meal breaks under clause 29(1). If an SRN under clause 29(1) can then establish that they were, on any given shift, held on call within the hospital during the meal break they will be entitled to the applicable shift or weekend penalties as it will count in the ordinary working hours for that day. It was to avoid the inconvenience of SRNs having to prove that they were on call on an occasion by occasion basis that the general provisions of clause 29(9) and the payment of a commuted allowance under it were introduced.

(14) Access to pro rata long service leave after seven years

168 A change allowing access to pro rata long service leave earlier than the qualifying date will compound existing leave liability issues by increasing the pool of leave that might be available to an employee at a time earlier than is currently the case, where the entitlement only arises when and if the qualifying period of 10 years' service is reached. The proposed changes do not provide a capacity to recover any pro rata long service leave that may be accessed where the entitlement to long service leave is ultimately not met. Other than enabling earlier access to leave in comparison to the private sector and the characterisation that earlier access is inevitably at a lower salary rate, there has been no compelling evidence presented by the respondent to support this claim.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

169 Personal leave covers an employee being ill or injured, an employee who has to care or support a member of the family or household, unanticipated matters of a compassionate or pressing nature or arrangements which cannot be organised outside of normal working hours or be accommodated by using flexible working hours or other leave. The applicant is opposed to any scheme which might provide employees with an incentive to not take leave that is available and which they should, if need be, take. The changes proposed by the respondent are also ambiguous with respect to whether the limit applies to personal leave from that accrual year.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

170 Currently agreement to a purchased leave arrangement and deferred salary scheme and the time at which the additional leave is taken is dependent on operational requirements. Operational requirements are defined in the 2010 Agreement and explicitly include an employee's existing leave liabilities. The current purchased leave provisions are based on standard WA public sector provisions which enable an employee to purchase up to ten weeks additional leave and is known as the 'Purchased Leave - 42/52 Salary Arrangement'. It is appropriate that operational requirements be the touchstone of employer agreement to purchased leave arrangement and a deferred salary scheme. If an employer cannot expressly have regard to operational requirements in deciding whether to agree to such arrangements there is the potential for the whole system to fall quickly into disrepute. If access to such arrangements has a significant impact on the cost and convenience of an employer carrying out its operations, resistance to the arrangements will grow. Under the current arrangements any decision to decline a request from a nurse or midwife to purchase additional leave or access the deferred salary scheme is already capable of being reviewed which provides sufficient protection of the benefit to employees. Mr Fergus is unaware of any instances where a nurse or midwife has raised the denial of a request to purchase additional leave or access the deferred salary scheme. There will also be an increase in the administrative burden placed on senior nurses if these claims are granted.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

171 Under the respondent's proposal if a person had two days of professional development leave unused at the end of the year and can prove that they had asked to take two days of leave during the year and the request had been denied they would be paid out two days' pay at the ordinary rate of pay. Professional development leave was introduced in 2001. For a range of reasons professional development leave may not be applied for or able to be taken in any given year and this issue was addressed and balance achieved in the 2010 Agreement by a clause providing that unused portions of the entitlement will accrue from year to year. Accrued entitlements are not paid out on resignation or termination because this leave is taken for a specific purpose and is not a general entitlement and if it is not taken there is no reason why it would be paid out. Paid leave for professional development is a considerable benefit to employees. The proposed change fails to take account of reasons why in any given year a person's request to take professional development leave may not be able to be accommodated. The entitlement is there

so that employees are paid while they are undertaking professional development and this is undermined if the entitlement may be paid out in circumstances where the professional development is not undertaken.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

172 The current clause was agreed as part of the negotiations for the 2010 Agreement. Nurses and midwives employed before 17 June 2011 were made subject to a 'no worse off approach' so that the new regime was not unfavourable to an existing employee. That is, where the combination of the district allowance previously payable and the gratuity was more than the new district allowance payable under the district allowance general agreement, the higher amount was preserved. The effect of the proposed change would be that all eligible nurses and midwives would receive both the rural gratuity and the district allowance. The applicant has presented no compelling evidence in support of the proposed change. The applicant has had no trouble filling country positions since the changes in 2010 and there is no cost of living increase justifying this change.

(20) 100% salary maintenance for redundant employees

173 Other than parity with hospital support workers, no reason has been given by the respondent for why provisions different to those applying to the majority of WA public sector employees should apply to nurses and midwives. The proposed clause represents a new entitlement for nurses and midwives which is inconsistent with long standing regulation of redeployment and redundancy for this group of employees. Mr Fergus understands that the applicant's current practice is that nurses are redeployed into 'like-for-like' positions.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

174 Even if it was possible to make different provisions to those applying under the *Workers' Compensation and Injury Management Act 1981* (the WCIM Act) no compelling reason has been given as to why this should occur.

(22) Parking charges

175 All rotating shift workers, that is those employees working outside Monday to Friday 7.00 am to 6.30 pm, have access to onsite parking. Employees rostered on emergency on call rosters also fall under this category. These employees are provided onsite parking on a user pays basis and the accessibility and availability of parking on site varies dependent on the parking spaces available at the relevant sites. One of the terms of the Agreement was that car parking at Graylands would remain available for a period of up to two years. This arrangement ceased at the end of August 2013 due to patronage falling below the threshold levels stated in the Agreement. An appeal mechanism is available should an employee wish to have their application for parking reviewed to determine whether they have been allocated the appropriate priority category.

(23) Establishment of a housing consultative committee

176 A consultative committee only addressing the issues of one occupational group is not appropriate and likely to entrench the existing perception of inequity in accommodation decisions. Where nurses have concerns about their existing accommodation a process is in place for matters to be addressed either with a regional operations manager or if the operations manager is unable to deal with the matter, the regional housing committee.

(24) Establishment of a graduate nursing consultative committee

177 Accommodating graduate nursing programs is based on the extent to which the appropriate environment is available to support graduates, that is, access to and the availability of senior nurses to provide supervision. The goals of the consultative committee cannot alter this basic requirement and are likely to increase workload grievances arising from an inappropriate skill mix.

(25) Establishment of a policy standardisation consultative committee

178 The establishment of this committee is contrary to management prerogative and will only address the issues or preferences of one occupational group. This is not appropriate and likely to have the effect that standardisation cannot be achieved given the absence of input from, and the consent of, all stakeholders.

Provisions Sought by the Applicant

(26) A change to portability and accessing pro rata long service leave provisions

179 The applicant proposes changes to long service leave provisions to clarify entitlements relating to portability. The proposed changes confirm portability is based on the principle of reciprocity. That is, a nurse or midwife transferring to another public sector, state, territory or Commonwealth jurisdiction in Australia will receive the same benefit of service recognition. Victoria does not currently reciprocate the recognition of service for the purposes of long service leave portability. Currently WA must recognise service from Victoria. There is no financial transaction that accompanies the recognition of service that is transferred from interstate jurisdictions. The proposed change is consistent with the portability of personal leave provisions in clause 34(42) of the 2010 Agreement. Mr Fergus claimed that there is no loss of conditions arising from the amendment sought to any nurse or midwife currently employed in WA however under cross-examination Mr Fergus agreed that under the applicant's proposal two circumstances where the payment of pro rata long service leave currently exists, have been deleted.

(27) A change to parental leave provisions by creating individual clauses for maternity, adoption, other parent and partner leave and a new unpaid grandparental leave provision

180 The applicant proposes having separate clauses for maternity, adoption, other parent and partner leave that are collectively known as parental leave and adding a new entitlement of unpaid grandparent leave. The clauses sought reflect the provisions of the *Public Service and Government Officers General Agreement 2011* and the *WA Health - United Voice - Hospital Support Workers Industrial Agreement 2012* (the Support Workers Agreement). There are several new entitlements which provide benefits for nurses and midwives such as the continuation of the higher duties allowance for the first four weeks of maternity leave, adoption leave or other parent leave, if in receipt of such an allowance for 12 months prior to commencing the leave.

Other benefits for nurses and midwives arise from the parental leave clauses. Clarification that paid maternity leave will be paid if the pregnancy terminates other than by the birth of a living child not earlier than 20 weeks before the expected date of the birth. Paid adoption related leave where the adopted child is under the age of 16 years, an increase from the 2010 Agreement which specified that the adopted child must be under the age of five years for an employee to be eligible for payment and travel time that is reasonably necessary to take custody of the adopted child can now be included in adoption leave. A new clause provides a minimum 52 weeks' leave, including 14 weeks' paid leave for the 'other parent' (not the birth parent) who provides principal care to a child the majority of the time. The intent of the clause is to take into consideration that the 'other parent' may or may not be the biological parent, and may not necessarily be the partner of the birth parent. To support access to this entitlement, the definition of 'primary caregiver' has been extended to include a child under the age of 12 months. Partner leave allows for the employee to have one week's paid leave following the birth of a child drawing from their personal leave credits, or if no personal leave is available, annual leave, long service leave, ADOs and/or time off in lieu of overtime, or unpaid leave if none of the above are available. The 2010 Agreement allowed an employee to take one week's unpaid partner leave upon the birth of a child. The proposed new unpaid grandparental leave is a new entitlement of up to 52 weeks' unpaid leave to nurses and midwives who assume the role of primary care giver to a newly born grandchild or newly adopted grandchild under the age of five. Mr Fergus claims that on balance the benefits of the proposed clauses outweigh any amendments which may be characterised as a loss, such as different notice periods.

181 Mr Fergus gave evidence about the history of the industrial regulation of nurses and midwives in WA and he gave details about the WA public sector wages policy. Mr Fergus stated that the total amount paid in salaries and allowances to all nurses and midwives, including casuals, is significantly higher than their annualised wage.

182 Mr Fergus gave details about the pay negotiations between the applicant and the respondent for the replacement of the 2010 Agreement, which was due to expire on 30 June 2013, and about correspondence and discussions between the applicant and the respondent up to when the Agreement was made. The applicant was of the view that the offer of the salary increase disposed of all claims that would result in increased remuneration to nurses and midwives and this included changes to the classification structure, retention bonus and professional development allowance which would increase an employee's remuneration.

183 Mr Fergus stated that nurses are employed by agencies other than the Department within the WA public sector, namely the Disability Services Commission and Department of Corrective Services. The terms and conditions of new industrial instruments covering nurses and midwives are, where relevant, historically flowed on to the industrial instruments covering those agencies in so far as they relate to the nurses they employ. Salary outcomes also flow on to increase the costs incurred by the applicant in engaging nurses and midwives through agency providers. Salary increases in industrial agreements covering enrolled nurses are traditionally linked to wage increases in industrial instruments covering nurses and midwives and the acute care private hospitals including the St John of God group and Ramsay Health Care usually follow the salary outcomes for nurses and midwives within the public sector. The impact of a 14% wage outcome for nurses and midwives has already been felt in bargaining with other occupational groups.

Michael Court

184 Mr Court submitted a report about WA's budgetary position, current economic conditions and the economic outlook based on the 2013/2014 Government Mid-year Financial Projections Statement. Mr Court's report shows that WA is experiencing a challenging fiscal environment and is currently forecast to have a small operating surplus. The forecast growth rate of 3.25% is the slowest in nine years and the moderation in domestic economic conditions is projected to flow through and result in lower employment growth, a higher unemployment rate and modest wage growth. The growth in the WA economy is expected to moderate further in 2014/2015 to 2.5% and grow by 3.75% in 2015/2016. This is below the average rate of growth in Gross State Product of 4.6% per annum. The total public sector net debt has increased significantly in recent years and these factors have contributed to a downgrading of WA's credit rating from AAA to AA+. This has resulted in the government implementing a Fiscal Action Plan to deliver savings to the government. In this environment even relatively small increases in government expenditure have the potential to put pressure on the state's finances. His report included government sector expenses and WA Government infrastructure investment programs as well as the forecast for gross borrowings of the total public sector. Mr Court also discussed the limitations on the government's ability to raise revenue and global economic conditions and outlook.

185 Mr Court commented on the cost of government employee salaries. He stated that salaries and current superannuation costs represent around 43% of recurrent expenses in 2013/2014 and the mid-year review forecast surplus for 2013/2014 represents a small buffer to absorb any unexpected financial shocks. The 14% wage outcome for the applicant's employees is almost double the current wages cap and the potential cost of the respondent's claims as estimated by the Department is around $130 million from 1 March 2014 to 30 June 2016. The Department of Treasury estimated the flow on costs across the public sector of the claims relating to a retention bonus and the cashing out of unused personal leave and he stated that any flow on costs with respect to these claims has the potential to put pressure on the state's finances and dilute the impact of measures contained in the Fiscal Action Plan. This may require offsetting reductions in service provision and/or put pressure on forecast levels of net debt.

Marie Baxter

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

186 Reinstating ADOs for nurses who work more than 41 hours per fortnight would present considerable operational challenges to WACHS. It would compound leave liability for nurses at a time when most nurses already have a significant liability and the Department is trying to reduce its existing leave liability. The majority of the workforce is part-time because it suits their lifestyle and these nurses and midwives already have time away from work such that accumulating additional time is not necessary. Operational difficulties may arise if more nurses had access to ADOs as it would put even greater pressure on

rosters at regional and remote hospitals where there is limited access to agency and casual cover. If part-time nurses are given the opportunity to take ADOs it would not be possible to cover them so hospitals would regularly have to manage with fewer nurses on shifts.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

187 Ms Baxter stated that in recent years there are no issues retaining nurses in WACHS and Ms Baxter believes that a retention bonus of $1,000 is unlikely to have any impact on a nurse's decision to stay or leave their job with WACHS. The decision to leave nursing in regional and remote WA is based on a significant number of variables, which may include financial reward. Ms Baxter believes that nurses are more inclined to stay nursing when they are well supported clinically and personally, when they are able to upskill and learn on the job and when their workplaces are enjoyable, fulfilling places to work. WACHS provides nurses with the opportunities to obtain further qualifications through distance learning, attend professional development events and access online learning and training. WACHS also tries to be as flexible as possible to ensure that nurses can meet their non-work obligations. The majority of nurses work part-time and they have flexibility with start and finish times and shift rostering to accommodate these needs. Nurses are provided with opportunities to move to other hospitals within WACHS to provide them a sea change, to fit in with their family requirements or to provide new opportunities in terms of speciality or type of work. Accommodation is provided which is an attraction for nurses considering working outside Perth.

(8) Increase in the afternoon shift penalty to 20%

(9) Increase in the Friday afternoon shift penalty to 25%

188 Friday afternoon shifts are not hard to fill and Ms Baxter does not support any increase in the penalty payment for any particular shift because over time more shifts would become the subject of an increased penalty payment until the point that a penalty was being paid on all shifts. It is also not a practical option for most WACHS hospitals to rely on agency support. Filling shifts is not as difficult as it is in metropolitan hospitals where nurses know that if they do not work agency or casual staff will be available to cover the shift. WACHS is flexible and accommodates nurses' personal obligations which means that nurses are often engaged on non-traditional shifts or unusual roster arrangements which suit both the nurse and WACHS. Use is made of internal deployment opportunities and some nurses will cover vacancies from within the hospital who are not required in their assigned ward because of low activity. A high proportion of the nursing workforce works part-time and this means WACHS has a significant level of built in flexibility within the system as part-time nurses may pick up extra shifts on occasion. Filling shifts in WACHS is therefore not as difficult as elsewhere.

(11) Payment of a lead apron allowance

189 Nurses employed in rural and remote areas which have X-ray facilities, and some regional areas that have operating theatres, may from time to time be required to wear protective clothing when operating X-ray and other radiological equipment. Ms Baxter does not believe that the amount of X-ray work undertaken by nurses exposes them to any safety risks related to radiation. Wearing the lead apron is no more uncomfortable than the protective equipment which nurses in other areas are required to wear for other types of work, for example, infection control purposes. This allowance for the disability of wearing a lead apron is therefore not justified.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

190 In WACHS casual nurses are only rostered on call in unusual circumstances. If there was a major emergency or disaster, such as a bushfire or cyclone, it may be necessary to have a casual nurse on call.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

191 Applications for purchased leave and deferred salary scheme are not now unreasonably refused or arbitrarily withheld within WACHS. Applications are considered on their merits and in the context of the existing parameters of operational requirements as provided by the 2010 Agreement. Ms Baxter is unaware of any issues where nurses were not allowed to purchase additional leave or being denied access to the deferred salary scheme. Nor is she aware of nurses being discouraged from making an application for purchased leave.

192 Ms Baxter encourages nurse managers to allow nurses to purchase additional leave or to access the deferred salary scheme if it is operationally feasible and approving these kinds of arrangements when possible demonstrates WACHS's commitment to supporting the workforce and to help in maintaining strong employment relationships. There are some financial implications with these arrangements and any significant increase in uptake would present a greater impost on an already overstrained budget. Ms Baxter stated that it has never been brought to her attention that nurses are unhappy with the way these arrangements are currently managed.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

193 Professional development leave accrues from year to year which enables more flexible access and takes into account the need to manage the taking of this leave carefully to ensure there is adequate cover available. Applications for professional development leave are approved to the extent possible within operational requirements. Ms Baxter believes that the payment in lieu of professional development leave would be contrary to the applicant's values and the importance placed on learning and development. Nurses may not reach their minimum hours of CPD required by AHPRA and they would not be meeting their competency and currency of practice obligations. Nurse managers are aware of the need to ensure that nurses meet their professional development obligations and Ms Baxter is unaware of any issues concerning nurses making use of their professional development leave.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

194 Payment of the enhanced district allowance rates to employees through the district allowance general agreement is fairer and a more equitable way of compensating WACHS staff working in rural and remote areas. It has resulted in most staff receiving the same level of payment for working in a locality irrespective of their occupational group. The benefit of receiving a district allowance is that it is paid on a regular fortnightly basis. Whilst employees engaged after 17 June 2011 are not entitled to a rural gratuity, where an entitlement previously existed those employed prior to this date had their entitlement maintained under a transitional arrangement. Ms Baxter does not see any reason for nurses to be paid a rural gratuity on top of their existing district allowances and she is not aware of the ending of the rural gratuity leading to any increase in attrition rates. A number of other incentives are offered to nurses working for WACHS in addition to the payment of district allowances.

(23) Establishment of a housing consultative committee

195 In some cases the provision of accommodation plays a role in the attraction and retention of staff but accommodation is not the sole or the most important consideration for WACHS in relation to attraction and retention of nurses. In regions where accommodation is a more significant issue such as the Kimberley, Pilbara, Goldfields and Midwest WACHS has established regional housing committees which oversee the provision and maintenance of accommodation for staff. The WACHS policy committee ensures that decisions about the allocation, cost and maintenance of accommodation are managed equitably. Where nurses have concerns about their existing accommodation they can raise the matter with their regional operations manager/coordinator of nursing and/or regional nurse director. If the operations manager is unable to deal with the matter they can refer it on to the regional housing committee to be addressed. In the two years Ms Baxter has worked at WACHS she has not had an issue raised with her about nurses' accommodation. This suggests that the existing management structure is functioning well. WACHS is currently in discussions with other government departments about the issue of regional housing. Ms Baxter does not believe it would be appropriate to have a committee on the issue of accommodation with the respondent when no such committee exists to address accommodation issues for other occupational groups.

(24) Establishment of a graduate nursing consultative committee

196 There are not a significant number of vacant nursing positions within WACHS and WACHS has the right number of graduate applicants for the number of graduate jobs. The suggestion that WACHS take on more graduate nurses might appear to be a good idea but it would have an adverse effect on the ability to employ more senior nurses and on clinical standards. Even if more graduate nurses were employed and it was possible for this not to have an impact on the number of more senior nurses employed, nursing profiles in hospitals would be adversely skewed with insufficient senior nurses to train and support graduate nurses on each shift and insufficient nurses to provide the appropriate level of clinical standards required on each shift.

(25) Establishment of a policy standardisation consultative committee

197 Consistent and standardised policies, practices and protocols are not always appropriate or desirable given the unique demands of providing hospital services in a regional and rural health care setting. WACHS is working hard to achieve standardisation where possible but total standardisation would not be a solution because this would not account for the different circumstances in WACHS in relation to other health services. The process of standardising policy and procedure is a complicated and occasionally challenging task with a number of stakeholders.

Janet Zagari

198 Ms Zagari gave evidence via a witness statement about the impact of the industrial action in February 2013 and its consequences for patients in WA public hospitals. She gave details about duties being withdrawn by nurses, the impact of bed closures, the cancellation of elective surgery and the consequences of strike action. Ms Zagari was not available to be cross-examined on her evidence.

Submissions

Respondent

199 There is the likelihood that WA will be 12,000 nurses short by 2025 and the respondent argues that the new provisions it is seeking to be incorporated in the 2013 Agreement are needed to ensure that WA has sufficient nurses and midwives both in the short and long term. The ANF Survey confirmed that over 60% of its members are planning to leave nursing in the next 10 years. The respondent claims that improved wages and conditions will assist in the attraction and retention of nurses and midwives and it is necessary to ensure that nursing remains an attractive choice for prospective students. The current nursing workforce will work longer if they have flexibility in their employment conditions particularly in relation to leave entitlements.

200 The respondent submits that the WA Government can afford to pay for the respondent's claims, many of which are no cost items. It is simply a matter of the WA Government making policy decisions and choosing where best to spend its income. The respondent argues that consideration needs to be given to whether the state can afford not to pay for the respondent's claims and the respondent claims that the evidence of Dr Birch about the state of the WA economy should be preferred to that given by the applicant. The respondent concedes that the costings provided by the applicant of its claims, where relevant, represent a 'general picture' of the financial impact of these claims, notwithstanding concerns about some of the assumptions underpinning these costings in some areas. The respondent maintains that the cost of its claims is insignificant compared to the human and monetary costs involved when poor patient outcomes arise due to shortages of nurses and midwives.

201 The respondent rejects the applicant's claim that the salary increase of 14% covered all salary-related claims contained in its log of claims. The respondent considers that the Agreement is clear in its terms. The Agreement includes a salary increase of 14% over three years which excludes items such as the retention bonus and additional salary increments. These were separate claims in the log of claims and if the Agreement intended to incorporate these items it would state this. The respondent

submits that under the Agreement there is no capacity for the applicant's claims to be arbitrated and the two claims being sought by the applicant will result in a loss in conditions, which is contrary to the Agreement.

202 The respondent claims that the Agreement was made by the parties in good faith. The respondent argues that the applicant's claim about duress is irrelevant as the applicant and the respondent jointly sought the arbitration of outstanding issues and the respondent claims that the applicant has acted unconscionably because it did not raise its claim about duress prior to the hearing. The respondent submits that duress or illegitimate pressure was not applied by the respondent and its members and finalising the Agreement was not the only alternative open to the applicant. The applicant's argument about illegitimate pressure and duress is also out of step with the reality of industrial relations and ignores the statutory regime under the Act which deals with collective disputes between employers and employees. The respondent claims that both parties exerted legitimate pressure prior to the Agreement being reached and any pressure that was applied during the negotiations for a new agreement was permissible and came about due to the applicant's own inaction and inflammatory conduct. Industrial action is a feature of industrial relations and plays a role in resolving deadlocks in collective bargaining. Nurses and midwives do not take industrial action lightly and this dispute was the first time industrial action had been taken by nurses and midwives in many years. During the dispute the applicant refused to bargain citing caretaker conventions and it was this obstructive position that escalated the dispute from a ban on non-nursing duties to bed closures. Furthermore, on 21 February 2013 the Commission issued directions that the applicant consider a proposal put by the respondent but this proposal, which was in line with government wages policy, was rejected by the applicant.

203 The applicant had several options open to it prior to the Agreement being reached on 24 February 2013. It could have requested the respondent's failure to comply with the Commission's order to cease industrial action, issued on 22 February 2013, be referred to the Full Bench of the Commission or it could have sought a Supreme Court injunction against the respondent. The applicant could have accepted the respondent's proposal put to it on 21 February 2013 or it could have waited to see if the planned strike action took place. Rather than using these options the Premier's representatives contacted Mr Olson to resolve the dispute by making an offer and finalising the Agreement.

204 The respondent argues that the claim related to parking is an industrial matter and there is no requirement on the Commission to ensure that all provisions contained in an industrial agreement relate to industrial matters (***Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch)*** (2004) 84 WAIG 694).

(1) An increase in the casual loading to 25%

205 The most recent assessment of the appropriate rate for a casual loading occurred during the Award Modernisation Process in 2008 by the then Australian Industrial Relations Commission (AIRC). During this process the AIRC determined that 25% casual loading should be the minimum standard to be included in awards, including the *Nurses Award 2010*. A number of other states pay nurses casual loadings higher than 20%.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

206 Nurses and midwives are not being treated in the same way as other Department employees with respect to ADOs. Enrolled nurses and allied health employees have agreements with the applicant allowing part-time employees to accrue ADOs and currently part-time nurses can access ADOs in certain circumstances. The applicant submits that there is no impediment to the Commission making an order giving effect to this claim, particularly as ADOs are a no cost item.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

207 Changes to the career structure and the addition of a retention bonus will assist in the attraction and retention of the nursing workforce. With 64.64% of the applicant's members who were surveyed indicating they are planning to leave their jobs in the next 10 years, attraction and retention is a real and pressing issue.

(5) Minimum classification for nurse practitioners to be SRN Level 7

208 All current nurse practitioners are classified as SRN Level 7 and this should be reflected in the 2013 Agreement. When considering the education, training and expanded scope of practice of nurse practitioners the minimum classification level should be SRN 7. As the claim reflects the status quo this is a no cost item.

(6) AMHPs to be paid a qualification allowance

209 In April 2013 the applicant employed 607 AMHPs of which 515 are registered nurses. It is a role that requires additional training with the duties involved being undertaken in extreme circumstances with patients in mental health crisis in the community. Being an AMHP is voluntary and nurses currently receive no recognition for this role. AMHPs also save the applicant thousands of dollars.

(7) Higher duties allowance to be paid on a shift by shift basis

210 The current higher duties regime is an anomaly in the 2010 Agreement which requires fixing. A nurse who acts up for an SRN Level 1 to 4 will receive payment on a shift by shift basis, but a nurse who acts up for a Level 2 nurse will only receive payment if he or she works in the higher position for five consecutive days.

(8) Increase in the afternoon shift penalty to 20%

(9) Increase in the Friday afternoon shift penalty to 25%

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

211 The respondent submits that increasing the penalty rates for unsociable hours and shifts assists in filling these shifts.

(11) Payment of a lead apron allowance

212 This claim is for an allowance of $2 per hour or part thereof to apply to nurses who are required to wear a lead apron when carrying out their duties. Lead aprons weigh between 3 - 5kgs and can cause sore necks, shoulders and backs. The impost of wearing a lead apron has been recognised in other states with allowances being paid in Queensland, NSW and Tasmania. Similar types of allowances are paid to other employees such as allowances for mortuary duties and handling foul linen.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

213 The applicant pays casual employees overtime in certain circumstances under the 2010 Agreement. Casual nurses who are on the on call roster are paid an on call allowance so they should also be paid overtime when recalled to work.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

214 In the 2010 Agreement an SRN who is rostered to carry a pager, who has to remain on site during their meal break and whose breaks are regularly interrupted by calls to return to the ward to deal with urgent clinical matters, with the employer's agreement, can elect to be paid a commuted meal break allowance in lieu of an entitlement to an unpaid meal break and on call entitlements. SRNs who are paid the commuted meal break allowance are receiving the equivalent of 30 minutes pay calculated on the employee's ordinary rates of pay. If there was no provision for a commuted meal break allowance the terms of clause 29(1) of the 2010 Agreement would apply with the 30 minute meal break being counted in the ordinary working hours for that day. The effect of this is that if the SRN is working a shift that attracts shift or weekend penalties and is paid in accordance with clause 29(1) the SRN will receive the shift or weekend penalty on the ordinary hours including the 30 minute meal break. However, if the SRN is paid in accordance with clause 29(9) of the 2010 Agreement they will only receive an allowance to the value of 30 minutes at the ordinary rate of pay. This is an anomaly that should be rectified.

(14) Access to pro rata long service leave after seven years

215 The respondent is seeking pro rata access to long service leave after seven years. This is of no cost to the applicant as the entitlement is not being increased because the respondent is only seeking access to leave accrued up to seven years of service. There are similar provisions for nurses in the ACT and NSW. The respondent has negotiated pro rata access after seven years in many private hospital agreements and public service employees and government officers are entitled to 13 weeks of long service leave after seven years.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

216 Cashing out of personal leave entitlements is about rewarding employees who do not use their sick leave and this claim is not about encouraging people to come to work when they are sick. Nurses and midwives are professional employees who know when they need to stay away from work. Filling shifts due to personal leave can be difficult and often adds to workload pressures with the shift being left unfilled or agency staff being called in who may not be familiar with the ward or area. This claim restricts the amount of personal leave that can be cashed out as it includes a limit of up to five days of the unused entitlement from that year being paid out, leaving the minimum entitlement of 10 days intact. The claim is not prohibited by the terms of the MCE Act because if this claim is incorporated in the 2013 Agreement it will satisfy the minimum provision of 10 days personal leave in this act.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

217 These claims relate to better access to additional leave. They are both no cost items and are a common feature of other public sector industrial agreements. If leave is properly planned and managed with adequate cover there should be no issue with nurses accessing these additional leave schemes and there should be no issue with the applicant providing written reasons why an application is being denied. Access to leave is an important issue for the respondent's members who require regular breaks to ensure they do not burn out. These claims do not interfere with managerial prerogative or put limits or boundaries on managerial decisions. The respondent is simply seeking that where an employee has an application refused they are notified and provided the reasons why in writing.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

218 Nurses and midwives are required as part of their Nursing and Midwifery Board registration to complete a minimum of 20 hours CPD each year and access to this paid professional leave is a problem for some employees.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

219 During negotiations for the 2010 Agreement the respondent was told by the applicant and representatives from the Department of Commerce that with the introduction of a new district allowance general agreement gratuity payments would be phased out for all government employees. However, this was not the case. Medical practitioners did not lose gratuity payments and teachers and police are paid a country allowance. There are shortages of nurses and midwives in many rural areas and reinstating the rural gratuity in full will assist with the attraction and retention of country nurses.

(20) 100% salary maintenance for redundant employees

220 This clause already exists in the applicant's agreement with support workers. In the past there have been very few occasions where the need to redeploy nurses and midwives has occurred, and when it has it has been in small numbers. In the future hundreds of nurses and midwives working at Swan Districts, Fremantle, Kaleeya, RPH and Princess Margaret Hospital face being made redundant and the respondent's members want certainty that the Department's current application of the *Public Sector Management Act 1994* (PSM Act) and the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* (PSM Regulations) will apply to them in the future.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

221 Nurses and midwives regularly work shifts that attract shift and weekend penalties and overtime. When a nurse or midwife is injured at work they should not have to worry about the rate of pay they will receive after 14 weeks and they should continue to receive the same average payment they received in the first 13 weeks rather than having to enter into arguments with insurance companies about what is a regular payment or what allowances are included. The Commission can allow this claim regardless of whether or not it is an industrial matter and this claim is not inconsistent with cl 11(3) sch 1 of the WCIM Act. The workers' compensation legislation does not 'cover the field' in the manner suggested by the applicant and it is possible to obey cl 11(3) of sch 1 of the WCIM Act and the proposed clause simultaneously. The proposed clause also does not suggest the schedule be ignored or dealt with in any way other than as it currently exists. For those employees injured prior to November 2011, limiting payments to age 65 is discriminatory.

(22) Parking charges

222 The increases to daily parking fees for nurses and midwives have been astronomical over the last four years. For example, at RPH the price of daily parking is set to treble by 2017 ($2.45 in 2009 to $7.50 in 2017) which is far in excess of inflation. Many nurses and midwives have no choice but to drive to work and they work unsociable hours, starting and finishing shifts at 7.00 am and 9.00 pm. Even if public transport was available at these times, it is often not safe or the journey takes too long after what is already a long 10 hour night shift.

(23) Establishment of a housing consultative committee

(24) Establishment of a graduate nursing consultative committee

(25) Establishment of a policy standardisation consultative committee

223 These claims are no cost items. Housing in some country towns is a problem and this affects the attraction and retention of nurses and midwives. Graduate nurses are unable to find positions, or are only being offered part-time contracts and the number of nurses on 457 visas is increasing. It is important that there is a plan in place to ensure there are adequate numbers of nurses and midwives in the future and the respondent wants to be part of that dialogue. Consistent policies, guidelines and standardisation of forms and documentation are often a feature of Coronial recommendations. For example, the recommendations made in 2009 regarding the deaths of Mr Kieran Watmore and Ms Pauline Partington. This is an important issue that affects nurses and midwives in the carrying out of their duties and patient safety.

Minister for Commerce

224 The Minister relies on and adopts the submissions made by counsel representing the applicant where relevant.

Applicant

225 The applicant argues that none of the claims being sought by the respondent should be granted. Although the applicant agrees to pay the wage increase contained in the Agreement and even though the Agreement states that there should be no loss of conditions for employees, the applicant argues that as a matter of legal and equitable principles, apart from the agreed salary increase, the Commission should not grant any of the claims being sought by the respondent. It is not fair and reasonable for the respondent to achieve an outcome by illegitimate pressure and win significant pay increases with no loss of conditions and then be able to pursue further claims with the other side being unable to seek to balance changes to the conditions being sought. The applicant says that the respondent has by illegitimate pressure disrupted the balancing exercise or compromised the approach which normally results in the registration of a new industrial agreement. The respondent orchestrated a process whereby the Commission is being asked to grant its claims against a background of a significant pay increase without the applicant being able to argue for alternative or changed clauses.

226 The applicant argues that if the respondent's claims are granted this will offend a number of the objects of the Act and s 26 considerations. These objects include, goodwill in the industry not being promoted, granting the claims would be contrary to ensuring agreements provide for fair terms and conditions, the terms of the Agreement do not balance fairness to employees with efficient organisation and performance of work, the Agreement does not encourage employers and organisations to reach agreements appropriate to the needs of enterprises and conciliation is not encouraged with a view to amicable agreement. Granting the respondent's claims would encourage parties to ignore the Commission's assistance in conciliation, it is contrary to the Commission providing the means to settle industrial disputes, it is not in accordance with equity and good conscience, and it does not have proper regard for the interests of the applicant in running the WA public health sector, nor the interests of the community.

227 The applicant argues that because the Agreement was made under duress, this voids the Agreement. The applicant claims that the actions of the respondent's members went beyond the normal conduct of industrial relations and granting the respondent's claims in this circumstance is therefore inappropriate. The applicant argues that the legal and equitable position is that if an agreement is the result of illegitimate pressure causing a party to agree to something when it believes, on reasonable grounds, that there was no other practical choice open to it, the agreement is void. Prior to the Agreement being reached nurses took industrial action by restricting duties and then closing hospital beds in WA public hospitals in the lead up to the state election. The respondent induced nurses to take industrial action and to escalate the industrial action by way of strike action despite a Commission order designed to stop industrial action occurring. Nurses and midwives made it clear that no order of the Commission was going to stop this action and the respondent encouraged them to take strike action. The industrial action taken by the respondent's members was unlawful after the order made by the Commission on 22 February 2013 issued. At the same time the health system was suffering and would suffer further from the escalation of any industrial action. By agreeing to the respondent's demands for a significant pay increase with no loss of conditions the WA Government felt that it had no choice but to agree to the respondent's demands.

228 In the alternative, the applicant argues that each of the respondent's further claims should be denied on a consideration of the merits of each claim, including the cost implications, and in circumstances where the applicant cannot seek any balancing changes to terms and conditions.

229 When assessing the respondent's claims, the applicant argues that it is relevant for the Commission to take into account the significant salary increase being paid to nurses with no loss of conditions or commensurate productivity improvements. Pay increases of the size given under the Agreement are well above those to which the government would typically agree to without there being productivity trade-offs or changes to conditions. Furthermore, a number of the claims being sought could be argued as a precedent which could be relied on to flow on to other public sector employees.

230 The applicant argues that the present attrition rate of registered nurses and midwives in the WA health system is 3% and the current average length of service at RPH for nurses and midwives is 10 years. There is therefore no issue retaining nurses in the workforce. Increasing numbers of graduates are applying for positions and the Department is doing everything it can to accommodate as many graduate nurses as possible. The Department is currently experiencing an employer's market whereby it is not difficult to attract nurses to cover vacant positions. Additionally, the Department has put in place a number of initiatives, both medium and long term, to deal with future nurse shortages which may occur.

(1) An increase in the casual loading to 25%

231 If the claim is granted it will deliver an additional salary increase of over 4% over three years to casual nurses already in receipt of a significant pay increase. A pay increase of over 18% over three years could make casual employment increasingly attractive to permanent staff, which is something the applicant wishes to avoid. There has not been an increase in the value of work undertaken by casual employees to justify the increase and to the extent that the casual loading compensates casual employees not having leave entitlements enjoyed by permanent staff there has not been sufficient increases to those leave entitlements to justify a 5% increase in the casual loading. Given the size of the employee group who would receive the increase if it was granted, and the real likelihood of flow on within and outside the public sector, such an increase in the casual loading should only be granted following a hearing on this issue.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

232 ADOs are available to full-time employees to give them additional paid breaks from work and there is not the same need for part-time employees to have these additional breaks. Part-time employees lost access to ADOs in 1998 as a result of an AIRC decision and as compensation they were awarded an entitlement to public holidays not previously enjoyed. In 2001 it was agreed that part-time employees could access ADOs where the applicant did not have to use agency nurses to replace the gap in the roster created by a part-time employee taking an ADO. The current ADO provisions for part-time employees are part of an arbitrated and negotiated outcome and it would be unfair and unreasonable to alter these conditions when the applicant cannot seek consequential change. The granting of this claim would also lead to further leave liability problems for the applicant.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

233 This is a salary claim which was settled by the agreement to pay employees a 14% salary increase. There is no justification for this change in terms of career progression, increments have to stop at some point and they currently stop at an appropriate point. The addition of another increment to Levels 1 and 2 will result in 'bunching' at the new top level and additional increments should only be introduced if this change complies with the Wage Fixing Principles.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

234 This is a salary claim as it will result in an additional payment to nurses and midwives for carrying out their usual duties. There is no need for a retention bonus as the WA public health system is not experiencing difficulties retaining nurses and midwives. Even if the system was experiencing difficulties retaining nurses and midwives there is no evidence that payment of a retention bonus would solve the problem in the short, medium or long term.

(5) Minimum classification for nurse practitioners to be SRN Level 7

235 The applicant does not accept that all nurse practitioner positions should be classified at SRN Level 7 and seeks to retain the ability to classify these positions between SRN Level 3 and SRN Level 6. There are also processes in the current industrial agreement to reclassify positions.

(6) AMHPs to be paid a qualification allowance

236 Payment of a qualification allowance to AMHPs is inappropriate. An AMHP designation is based on experience gained through employment rather than by obtaining a qualification. The only requirement to undertake this role is the completion of a three day training course and completing this course is not the same as obtaining a qualification to which payment of the qualification allowance attaches. The functions associated with being an AMHP are performed on an as needs basis as part of the person's employment and are not additional day to day duties or requirements. Where the duties of an AMHP are performed outside of a person's normal working hours the appropriate penalty payments apply. The functions associated with being an AMHP do not increase the value of the work required of AMHPs to warrant the payment of an allowance. The additional duties associated with the AMHP designation do not add to the work value sufficiently, when compared to the normal duties of mental health nurses, to warrant any additional payment.

(7) Higher duties allowance to be paid on a shift by shift basis

237 The payment of a higher duties allowance applies only if a person acts in the higher position for five days or more and deviations from that approach have been introduced by agreement between the applicant and the respondent to address particular issues. The current arrangements are fair and reasonable and there is no basis for the change being sought.

(8) Increase in the afternoon shift penalty to 20%

238 The afternoon shift penalty was increased by agreement from 12.5% to the current 15%, in 2007 and there is no need to increase the shift penalty to compensate for unsociability or making afternoon shifts more attractive. There is currently no difficulty filling afternoon shifts and increasing the penalty will make other shifts more difficult to fill.

(9) Increase in the Friday afternoon shift penalty to 25%

239 Friday afternoon shifts are not difficult to fill and have not become more unsociable since the 15% shift penalty was agreed to in 2007. Making Friday afternoon shifts more attractive will only lead to flow on difficulties in filling other shifts.

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

240 Working public holidays is dealt with in a specific clause in the current agreement. A shift penalty of 50% is paid for work on public holidays but a day's leave is credited to the nurse or midwife working on the public holiday to ensure all nurses and midwives get 10 public holidays each year. On some Sunday night shifts the penalty paid drops from 75% to 50% at the start of the public holiday but there is compensation in that a day of leave is credited to these employees.

(11) Payment of a lead apron allowance

241 Nurses who wear a lead apron are allowed additional paid breaks as necessary to maintain or restore them to normal health. There is no unusual or significant level of discomfort associated with the wearing of a lead apron.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

242 The current arrangements were part of a negotiated outcome in 2007 with both parties compromising to reach an agreement that balanced the interests of employees and the employer. There are reasons why casual employees and permanent employees are treated differently in the 2010 Agreement and it is inappropriate to seek to merge terms and conditions for casual and permanent employees which have developed differently over time as a result of the modes of employment being different.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

243 It would be unfair to grant this claim when the current arrangements have been agreed between the parties. Furthermore, the applicant would not have made this agreement if this allowance was to attract shift and day penalties.

244 The allowance is a commuted allowance and is a set payment replacing variable individual payments made on an 'as and when they arise' basis. The need to pay an allowance on different occasions is replaced by the payment of a set amount without regard being had to the circumstances which may trigger the payment of the allowance. As part of receiving a commuted allowance the amount paid on some occasions will be less than what would be paid if the payment it replaces were made but on other occasions it will be paid where the circumstances for payment of the allowance it replaces do not arise. This is the 'swings and roundabouts' nature of a commuted allowance. The non-payment of penalties and the payment of the allowance on occasions when the disability is not suffered is the essence of a commuted allowance. This claim is contrary to the idea of a commuted allowance as it seeks payment of a commuted allowance with penalties being paid.

(14) Access to pro rata long service leave after seven years

245 If this claim is successful it would be costly, due to the need to cover leave, although there may be some offset with employees taking pro rata leave at a lower rate of pay than would be paid if taken after 10 years. The granting of this claim would also further compound leave liability issues.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

246 The applicant does not support the paying out of unused personal leave as this leave is to be used when the need arises and it should accumulate from year to year to meet this need. This claim is also prohibited under the provisions of the MCE Act. Under the 2010 Agreement there are entitlements to sick leave and family care leave, which the entitlement to personal leave replaced. Under s 19(3) of the MCE Act leave for illness, injury and family care is cumulative which means it must be allowed to grow by accumulation. This cannot occur if all or part of the unused accrual in any given year is paid out. Section 19(4) of the MCE Act provides that entitlements to leave for illness, injury and family care can only be used under s 20 and s 20A which in turn provides for paid sick leave and paid carer's leave. These leave entitlements therefore cannot be taken by the conversion of them to a money payment in circumstances where the leave is not taken.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

247 The current provisions fairly and reasonably balance the interests of the applicant and employees and the claim attempts to unreasonably weight discretion in favour of granting requests. The granting of these claims would also place pressure on the current public sector policy to reduce leave entitlements. If these claims are successful, it would add considerably to the administrative burden on nurse managers when declining a request for leave as they will have to notify the employee in writing with reasons for the refusal.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

248 The current provisions fairly and reasonably balance the interests of the applicant and employees. The cashing out of professional development leave in any circumstances, even to address the problem the respondent says may arise in relation to access, which is denied, is entirely inappropriate.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

249 When the *District Allowance (Government Wages Employees) General Agreement 2010* was registered prior to the 2010 Agreement, the increases in district allowance payments were unsustainable in combination with the payment of the rural gratuity and an agreed formula was negotiated to apply in the 2010 Agreement. What is now being sought by the respondent is unfair and would not have been agreed to by the applicant. Due to the circumstances in which this matter comes before the Commission, the applicant cannot now argue that Clause 49. - District Allowance be removed or changed if the full rural gratuity is to be paid. There is no evidence to suggest that payment of the rural gratuity and the district allowance is necessary to attract people to and retain them in relevant positions.

(20) 100% salary maintenance for redundant employees

250 Under s 95(1)(b) of the PSM Act the Commission cannot make an order which is inconsistent with the PSM Regulations or even if such an order were made, the provisions of the PSM Regulations would continue to apply despite the order. Even though a provision purporting to change the operation of reg 18(4) and reg 18(5) of the PSM Regulations was, by agreement, included in the Support Workers Agreement and that agreement was registered by the Commission it may be that neither party to that agreement ever raises an issue as to the validity of the clause. However, if the Commission is being asked to make an order in the terms sought, the applicant brings s 95(1)(b) of the PSM Act to the Commission's attention.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

251 There is a longstanding and comprehensive legislative regime for workers' compensation in the WCIM Act. The claim seeks two changes to this legislative scheme and the Commission does not have the power to make such an order given the provisions of the WCIM Act as the proposed changes are inconsistent with the terms of the WCIM Act. If the claim is granted the cost would have to be met by the applicant as the applicant's insurance arrangements would not cover the proposed additional payments.

(22) Parking charges

252 This claim is not an industrial matter. The applicant opposes the respondent's claim even though it recognises the importance of the issue to the respondent and its members.

(23) Establishment of a housing consultative committee

(24) Establishment of a graduate nursing consultative committee

(25) Establishment of a policy standardisation consultative committee

253 There is no need for such committees in light of what is already happening in these areas.

Consideration

Credibility

254 I listened carefully to the evidence given by each of the witnesses and closely observed each witness. In my view the evidence given by all of the respondent's witnesses was given honestly and to the best of their recollection. I have the same confidence in the veracity of the evidence given by the applicant's witnesses. Hearsay evidence was given at times by some witnesses. Where this was in dispute I have had regard to evidence supported by relevant documentation or evidence based on recorded and substantiated information. One of the applicant's witnesses Ms Zagari was unavailable for cross-examination. Where there is a dispute between the parties with respect to her evidence, where relevant, I am unable to give her evidence the same weight as other evidence given in these proceedings.

255 Section 42G of the Act provides as follows:

42G. Parties may agree to Commission making orders as to terms of agreement

(1) This section applies where —

(a) negotiating parties have reached agreement on some, but not all, of the provisions of a proposed agreement; and

(b) an application is made to the Commission for registration of the agreement as an industrial agreement, the agreement to include any further provisions specified by an order referred to in subsection (2); and

(c) an application is made to the Commission by the negotiating parties for an order as to specified matters on which agreement has not been reached.

(2) When registering the agreement, the Commission may order that the agreement include provisions specified by the Commission.

(3) An order referred to in subsection (2) may only be made in relation to matters specified by the negotiating parties in an application referred to in subsection (1)(c).

(4) In deciding the terms of an order the Commission may have regard to any matter it considers relevant.

(5) When an order referred to in subsection (2) is made, the provisions specified by the Commission are, by force of this section, included in the agreement registered by the Commission.

(6) Despite section 49, no appeal lies from an order referred to in subsection (2).

256 An arbitrated outcome pursuant to an application under s 42G of the Act gives the Commission a broad discretion to settle the dispute between the parties and to reach conclusions based on the evidence before the Commission. In my opinion when

making a decision under s 42G of the Act the Commission can and should also consider the objects of the Act as set out in s 6 and the provisions of s 26 of the Act.

257 The following objects contained in s 6 of the Act are in my opinion relevant:

(ae) to ensure all agreements registered under this Act provide for fair terms and conditions of employment;

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

(ca) to provide a system of fair wages and conditions of employment;

258 The provisions of s 26 of the Act which apply in this instance in my view are as follows:

26. Commission to act according to equity and good conscience

(1) In the exercise of its jurisdiction under this Act the Commission —

(a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and

…

(c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and

(d) shall take into consideration to the extent that it is relevant —

(i) the state of the national economy;

(ii) the state of the economy of Western Australia;

(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;

(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;

(v) any changes in productivity that have occurred or are likely to occur;

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

(vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

259 When balancing equity and fairness and a just outcome to apply to employees covered by the 2013 Agreement, as well as the interests of both parties, I find that it is appropriate to include a number of elements of the respondent's claims, some in part, in the 2013 Agreement. I have also decided to deal with some of the claims raised by the respondent in different terms to what the respondent was seeking. In arriving at these conclusions, I have taken into account the objects of the Act I have identified when determining fair terms and conditions to apply to employees covered by the 2013 Agreement. I have also applied s 26 considerations to the decisions I have reached when determining what should be included in the new and revised clauses in the 2013 Agreement.

260 The applicant argues that if the respondent's claims are granted this could put pressure on the government's economic outlook and create a precedent for other public sector employees when negotiating future wage increases. I have considered the overall economic impact on the applicant, the WA Government and the WA community of the new clauses and changes to some of the existing clauses that I have decided should be included in the 2013 Agreement. I have no reason to believe that the costs related to the inclusion of the terms of these clauses are not manageable or unreasonable in all of the circumstances given the state of the WA economy. I also find that the cost of these changes will not cause undue hardship to the WA Government's budget processes notwithstanding the applicant's agreement to pay employees covered by the 2013 Agreement a 14% salary increase over the life of the agreement. In reaching this decision I am of the view that some of the claims I have determined should be granted are cost-neutral (claims (2), (14), (16), (17), (23), (24) and (25)). The other claims to be incorporated in the 2013 Agreement will in my view have a minimal financial impact on the applicant and therefore the WA economy.

261 I do not believe that the claims I have decided should be included in the 2013 Agreement will necessarily flow on to other employees in the WA public sector. Each negotiation with respect to any future wage increases and conditions in the WA public sector is to be determined on the merits of each claim and within the current WA Government Wages Policy. Automatic flow on of these claims therefore does not apply.

262 The applicant claims that the respondent and its members applied duress and forced the Premier into making the Agreement. The Agreement is therefore void, although the applicant is prepared to honour the 14% salary increase provided for in the Agreement. The applicant also argues that none of the respondent's other claims should be entertained by the Commission as the implementation of the Agreement offends a number of objects of the Act.

263 After considering the circumstances leading to the making of the Agreement, which was a conditional offer to the respondent and subject to the then WA Government being returned to office, and the conduct of both parties during this period, I find that the Agreement was not reached due to the Premier being placed under duress and forced into a position to finalise the Agreement. I also reject the applicant's claim that the respondent induced its members to take industrial action to pressure the

applicant and the WA Government to agree to the wage offer contained in the Agreement. I am therefore not persuaded that the Agreement is void and the claims being sought by the respondent should not be considered.

264 I find that the conduct of both the applicant and the respondent contributed to the escalation of the industrial dispute and the taking of industrial action by the respondent's members prior to the Agreement being finalised. I also find that a mechanism for the parties to move forward to discuss the terms of a new industrial agreement could have been agreed between the parties prior to the Agreement being reached if both the applicant and the respondent had been prepared to negotiate in good faith in the period prior to the Agreement being reached.

265 The respondent served a comprehensive log of claims on the applicant in November 2012, which included a claim for a 20% salary increase over three years as well as a retention bonus and career progression payments. Even though the 2010 Agreement did not expire until 30 June 2013 I find that this did not prevent the respondent from seeking discussions with the applicant and exchanging views about the possible parameters of any wage increases to be included in a new industrial agreement as well as the operative date of a wage increase at this point in time. I also note that the respondent sought discussions with the applicant at this time about the framework terms for a new agreement given the protracted discussions and delay in finalising the 2010 Agreement which resulted in employees receiving a pay rise some months after the 2007 Agreement expired. On 29 January 2013 correspondence was exchanged between the parties about the respondent's claims and the applicant confirmed that annual wage increases of 3% - 4.25% could possibly be negotiated between the parties. On or about 4 February 2013 the respondent's members commenced low level industrial action in the form of a ban on non-nursing duties in support of its claims. Further negotiations about a possible wage increase and the operative date for any increase were then put on hold at the applicant's initiative when the WA election was called on or about 6 February 2013. On 19 February 2013 the Department's Director General emailed a global message to nurses and midwives titled 'Industrial action update'. This message stated the following: 'I have received formal legal advice from the State Solicitors Office confirming that I am unable to make any offer to nurses and midwives during the caretaker period'. Around this time the industrial action being undertaken by the respondent's members escalated to include bed closures which resulted in longer waits for some patients in emergency departments. On 19 February 2013 the applicant sought the Commission's assistance to deal with the dispute between the parties and the escalating industrial action being undertaken by the respondent's members. On 20 February 2013, and in order to assist the parties to resolve their dispute, the Commission issued an interim order requiring the applicant to confirm if he could commit to an operative date for the first pay period of any wage increase but the applicant declined to do so on the basis that the WA Government was in caretaker mode. On 21 February 2013 the Commission issued directions that the applicant consider a wage proposal put by the respondent to assist in the prevention of any further deterioration of the industrial relationship between the parties and the respondent and its members reconsider the continuation of industrial action. The recitals to these directions observed that at the time both parties had contributed to their poor industrial relationship. The applicant again stated that it could not consider the respondent's proposal, which it appears was within the parameters of the then WA Government Wages Policy, as the WA Government was in caretaker mode.

266 I find that when the applicant did not propose any wage offer parameters or operative date to the respondent and its members citing the caretaker convention, the industrial relationship between the parties deteriorated further and contributed to the respondent and its members escalating the industrial action it was undertaking including the possibility of strike action on 25 February 2013. It was not in dispute and I find that the applicant had made wage offers to unions to settle disputes, including the respondent, when the WA Government has previously been in caretaker mode (see evidence of Mr Conran). Furthermore, notwithstanding the WA Government being in caretaker mode, and contrary to the applicant's previous position about being unable to make conditional wage offers whilst in caretaker mode, a conditional wage offer was made to the respondent and its members on 24 February 2013. In my view this undermines the applicant's claim that it was unable to progress wage negotiations with the respondent in the period up to 22 February 2013 which would in my view have assisted in resolving the dispute between the parties and if an agreement could have been reached between the parties it could have resulted in a hold on industrial action being undertaken at the time. It is the case that the applicant belatedly made an offer to the respondent which included a proposed operative date and the possible parameters of a wage increase at a conference before the Commission on the afternoon of 22 February 2013 however the offer was rejected by the respondent on the basis that by now the possible wage increase proposed by the applicant was insufficient. It is in these circumstances that I find that the offer made by the Premier on 24 February 2013 to the respondent at the meeting between Mr Olson and Mr Conran was not as a result of duress being applied by the respondent. I find that at the meeting held on 24 February 2013, arranged at the initiative of the Premier and after the applicant had for some time claimed that no wage offer could be made to the respondent, Mr Olson and Mr Conran exchanged views about the terms of a possible agreement. I find that after having discussions for approximately an hour and after talking about the proposed terms of a mutually acceptable agreement, the terms of a conditional agreement were agreed between Mr Olson and Mr Conran on behalf of the Premier.

267 I find that finalising the Agreement was not the only option open to the Premier during the dispute and I find that the applicant had alternatives to settle its dispute with the respondent apart from reaching the Agreement. During conciliation proceedings before the Commission the applicant could have negotiated and agreed on a framework process with the respondent to finalise a specific wage increase at a future date, subject to the election outcome and the applicant could have requested that the Commission arbitrate the dispute between the parties under s 44 of the Act using application C 175 of 2013 but it chose not to do so.

268 There was no evidence in support of the applicant's claim that the respondent induced its members to take industrial action to pressure the applicant and the WA Government to agree to the wage offer contained in the Agreement. This submission therefore has no substance.

269 The applicant argues that the respondent's claims should not be considered as the Agreement, which it claims was made under duress, prevents the applicant from arguing for any alternative provisions to be included in the 2013 Agreement. Further, this constraint on the applicant is contrary to a number of the objects of the Act. I have already found that the Agreement was not reached under duress and that it was freely entered into by Mr Conran on behalf of the Premier and Mr Olson on behalf of the

respondent's members. There were also alternatives open to the applicant to resolve the dispute between the parties prior to 24 February 2013 using the assistance of the Commission instead of concluding the Agreement but the applicant chose not to do so. In the circumstances I find that the Agreement, which is clear in its terms, should form the framework for determining the outcome of this joint application. Given this it is my view that the applicant cannot now rely on it being at a disadvantage by not being able to propose alternative conditions with respect to the respondent's claims or that the Agreement offends a number of objects of the Act.

270 I find that the increases contemplated in the respondent's claims for a revised classification structure and the payment of a retention bonus to some employees were not contemplated nor included in the 14% salary increase provided for in the Agreement. The log of claims served on the applicant in November 2012 included career structure increments and the payment of a retention bonus as separate items over and above the salary increase claimed by the respondent. There was no evidence given in the proceedings confirming that these two claims were satisfied and expressly included in the 14% salary increase during the meeting between Mr Conran and Mr Olson nor was there any mention in the Agreement that these claims formed part of the Agreement. I find that there was no discussion at the meeting about employees who are eligible to receive these two entitlements, if they were granted, and how this would impact on each employee's 14% salary increase. There is no mention in the notes taken by Ms Loveridge on behalf of the respondent at the meeting with Mr Conran on 24 February 2013, which I have no reason to doubt are accurate, that the 14% salary increase also satisfied these two claims. Mr Conran gave evidence that he was aware that a log of claims had been lodged with the applicant when the Agreement was finalised however he was unclear as to the details of what was contained in this log of claims. In my view this adds weight to my conclusion that the two additional claims, which the applicant argues should not be considered by the Commission, were not factored into the 14% salary increase. As these two claims were not discussed or formed part of the agreed 14% salary increase contained in the Agreement these claims will be considered in addition to the 14% salary increase.

Respondent's claims

(1) An increase in the casual loading to 25%

271 The respondent is seeking to increase the casual loading by 5% to 25%. In my opinion there is insufficient evidence before the Commission to warrant the granting of this claim at this point in time. I note that the quantum being claimed applies to nurses employed under the *Nurses Award 2010* and it may be the case that the proposed increase to the casual loading is justified. Liberty to apply will therefore be granted to the respondent to re-activate this claim during the life of the 2013 Agreement.

(2) Reinstatement of ADOs for part-time nurses and midwives working more than 41 hours per fortnight

272 The respondent proposes that ADOs for part-time employees who work more than 41 hours per fortnight should not be restricted by the criteria applying as specified in Clause 25(3)(b) of the 2010 Agreement. In my view it is appropriate that part-time employees who work more than 41 hours per fortnight should be able to access ADOs in the same way as permanent employees. Evidence was given by both parties during the proceedings that a number of part-time nurses, in particular numerous graduates, work close to full-time hours. As a significant number of part-time employees work close to full-time hours I find that they would benefit by having flexibility in their working hours. I note that this claim is cost-neutral as employees pay for this time off by working additional unpaid hours and the additional time worked to take off as an ADO in some instances fits in to the 24 hour shift pattern worked by nurses and therefore benefits the applicant. This provision as proposed by the respondent will therefore be incorporated into the 2013 Agreement.

Consequential amendments - alterations to Clause 25. - Hours of Work and Rostering in light of part-time employees being granted greater access to ADOs

273 As I have granted the claim that part-time employees who work more than 41 hours per fortnight be entitled to an ADO in the terms sought by the respondent the consequential changes proposed by the respondent at Clause 25 shall be incorporated into the 2013 Agreement.

(3) Additional increments for registered nurses at the top of the Level 1 and Level 2–classification scales and EMHNs

274 The respondent proposes that registered nurses classified on the highest increment in levels 1 and 2 and employees on the EMHN highest pay point will from 1 July 2014 advance to a new classification level and twelve months later these employees will have their pay increased to another level. The increase for each annual progression is $20 per week. Evidence was given during the proceedings confirming that most registered nurses are employed at the top of level 1 or top of level 2 and that most EMHNs are at the top pay point. This would therefore result in over 49% of FTE employees automatically receiving an additional $1,040 each year over the next two years during the life of the 2013 Agreement if this claim was granted, which in my view will result in a substantial increase to an employee's salary and will be a significant cost to the applicant.

275 In my view any change to the classification structure should be transparent and linked to a change in the value of the work required of a position. No evidence was provided by the respondent as to any change to the work required of registered nurses working at the top of levels 1 and 2 and EMHNs at the top pay point. Whilst the respondent emphasised the need to attract and retain nurses in the short and long term evidence was given by the applicant, which I accept, that nurses currently have a low attrition rate. Some evidence was given by the respondent about increasing workloads of employees and the need to reduce the salary gap between allied health employees and nurses however this evidence was very general and details with respect to specific employee classifications were not provided. Given the demography of the current cohort of nurses employed by the applicant, many will be retiring in the near future. However, there was no evidence that significant numbers of nurses were currently leaving their employment or that a substantial number of nurses would remain in the long term if the classification levels were altered by additional increments.

(4) Payment of a retention bonus for employees employed for the duration of the 2013 Agreement

276 The respondent is seeking a retention bonus of $1,000 to be paid to all permanent employees who are employed at the date of registration of the 2013 Agreement and who remain employed as at 30 June 2016. This bonus will apply on a pro rata basis to part-time employees. Apart from the respondent's emphasis on the attraction and retention of nurses with respect to its claims no evidence was presented by the respondent as to why this bonus should be paid to nurses. The ANF Survey found that a number of nurses would continue in the workforce should this bonus be paid to them however there was no evidence that this payment would have a long term impact on nurses remaining in the workforce. As there was evidence that the current rate of attrition of nurses is low, I find that there are no compelling reasons for including a retention bonus in the 2013 Agreement. This claim is rejected.

277 In relation to claims (3) and (4) I find that insufficient data was provided by the respondent with respect to attraction and retention problems and what was provided does not persuade me to grant these claims. It is clear that there will be issues concerning the attraction and retention of nurses in the WA public health system during the life of the 2013 Agreement and up to 2025. I accept that salary increases assist in attracting nurses into the workforce however in my view this will to some extent be dealt with by the 14% salary increase granted to nurses under the Agreement. There was no direct evidence that having a revised career structure with increases of $20 per week for registered nurses working at the top of levels 1 and 2 and EMHNs at the top pay point will contribute in any significant way to the attraction and retention of nurses within the WA Health system. There was evidence that nurses who remained employed for the life of the 2013 Agreement may keep working for an indeterminate amount of time if they were paid a retention bonus, however I find that the payment of a bonus is only one factor which may influence a nurse to remain in the workforce. It is therefore unclear if granting these claims will have a significant impact on the retention of nurses within the WA health system and they will be rejected.

(5) Minimum classification for nurse practitioners to be SRN Level 7

278 There was no dispute that all current nurse practitioners are classified at SRN Level 7 and this claim is therefore a no cost item. I am unaware why there is currently a classification range of SRN Level 3 to SRN Level 7 if it is appropriate to classify all nurse practitioners at SRN Level 7. In the circumstances I will hear further from the parties within 28 days from the issuance of these reasons for decision with respect to this claim before deciding whether this claim should be included in the 2013 Agreement.

(6) AMHPs to be paid a qualification allowance

279 The respondent is seeking an allowance to be paid to employees appointed as AMHPs. I agree with both the applicant and the respondent that the allowance being sought does not constitute a qualification allowance. I find that employees who are designated as AMHPs should be recognised for the duties they undertake in this role which was not in dispute were additional to their normal duties. I acknowledge that undertaking the AMHP role contributes to the professional development of an employee and the person carrying out this role can benefit from the skills developed, however, this voluntary position is a role which is of significant financial benefit to the applicant as AMHPs perform these critical roles in a cost-effective manner. I will therefore include an allowance in the 2013 Agreement for employees who are appointed as AMHPs in the amount being sought by the respondent. I require the parties to negotiate as to where this allowance should appear in the 2013 Agreement and the title of this allowance prior to this application being finalised.

(7) Higher duties allowance to be paid on a shift by shift basis

280 The respondent is proposing that employees be paid a higher duties allowance for any period of one day or more when working in any position classified higher than their substantive position. Currently this only applies at the discretion of the employer where relief is identified as a regular feature or requirement of a particular position. There is already the discretion for this allowance to be paid to an employee who undertakes higher duties for less than five days. In my view, if an employee undertakes additional duties at a classification higher than their substantive position they should be recompensed for doing so. I therefore find that it is appropriate that when an employee undertakes higher duties for a period of one day or more the higher duties allowance should apply. This provision will be included in the 2013 agreement.

(8) Increase in the afternoon shift penalty to 20%

(9) Increase in the Friday afternoon shift penalty to 25%

(10) Night shift penalty on a Sunday extended to 0730 on a Monday which is a public holiday

281 The respondent is seeking to increase shift work allowances payable for employees working afternoon shifts and the extension of the Sunday night shift penalty where the following Monday is a public holiday. In my opinion insufficient evidence was given in these proceedings to justify this claim. There was also no evidence directly confirming the respondent's assertions that these shifts are difficult to staff. Given the lack of supporting evidence in relation to why these shift allowances should be increased in the manner sought by the respondent, the provisions proposed by the respondent will not be included in the 2013 Agreement.

(11) Payment of a lead apron allowance

282 The respondent is seeking a new allowance of $2 per hour or part thereof to be paid to nurses who are required to wear a lead apron. Evidence was given during the proceedings that lead aprons are required to be worn for lengthy periods at times as it is often difficult for employees who wear these aprons to take a break. These aprons weigh approximately 3 – 5 kilograms and a thyroid collar weighing 245 grams is also worn. I accept that this safety equipment is cumbersome to wear and onerous. I also find that the wearing of a lead apron is a requirement over and above other special gowns and equipment required to be worn by nurses for example in emergency departments and for infection control. This allowance will be incorporated into the 2013 Agreement.

(12) Casual nurses on an on call roster to be paid overtime rates when recalled to work

283 This claim relates to casual employees who are on call and recalled to work being paid for a minimum of three hours at the appropriate overtime rate. I accept the respondent's claim that if a casual employee is rostered to be on call and is recalled to work this is different to employing a casual employee on an irregular and non-rostered basis. I find that when a casual employee is on call this is a similar situation to a permanent part-time employee or full-time employee being recalled to work when on an on call roster and having to make themselves available to do so. As I find that there is merit to this claim when a casual employee is on call, this claim will be incorporated into the 2013 Agreement.

(13) Commuted meal break allowance paid to an SRN to attract applicable shift or weekend penalty rate

284 The respondent wants the commuted meal break allowance paid to SRNs to attract a shift or weekend penalty rates and that the commuted allowance can apply without the employer's agreement. In my view, an SRN who regularly carries a pager and is rostered to remain on site and be available to work and does so for the duration of a meal break should, if the SRN chooses, be entitled to a commuted meal break allowance without having to negotiate with their manager to obtain this entitlement. I also find that it is appropriate that the applicable shift or weekend penalty rates apply to this allowance as the employee is working that additional time during the day as the employee is effectively working during their lunch break. This change proposed by the respondent will be incorporated into the 2013 Agreement.

(14) Access to pro rata long service leave after seven years

285 The respondent is seeking a provision that an employee be able to access pro rata long service leave during the first accrual period of long service leave any time after the completion of seven years of continuous service. The respondent maintains that as the employee has accrued the long service leave entitlement this is a no cost item to access long service leave after seven years. The respondent also claims that taking long service leave earlier than it would be due at 10 years of service is a cost saving for the applicant because wages will have increased after three more years of service. The applicant opposes this change as an employee may not complete the required 10 years of service to be eligible for their long service leave entitlement. I find that there is a cost saving to the applicant if employees are allowed to take pro rata long service leave owing to them earlier than 10 years at a lower salary rate. I also find that this change will give employees flexibility to take leave earlier than currently and this would in all likelihood assist in the retention of nurses in the workforce. This claim will be incorporated in the 2013 Agreement.

(15) Ability to cash out up to five days of unused personal leave at the end of each year

286 The applicant proposes that at the end of the year of accrual an employee with unused personal leave may request to forgo up to five days of personal leave in exchange for payment at the rate which would have applied had the days been worked. I have carefully considered the submissions of the parties in relation to this matter and the purpose of personal leave entitlements being available to employees. I am not convinced that it is appropriate for employees to access payment in lieu of maintaining accrued personal leave. In my view personal leave accrues so that people can access it as and when they need to and I find that it is appropriate and necessary that employees retain access to this leave if it is required at some stage. This claim is denied.

(16) Requests for access to purchased leave not be unreasonably refused and reasons to be given where refused

(17) Requests for access to deferred salary scheme not be unreasonably refused and reasons to be given where refused

287 The respondent is seeking greater flexibility and transparency for employees to access purchased leave and the deferred salary scheme. I find that the changes proposed by the respondent with respect to both of these claims should be incorporated in the 2013 Agreement. I find that these are no cost items as this leave has been previously paid for by an employee. The changes sought enable the applicant to retain managerial prerogative in relation to granting leave however the applicant is required to be more transparent about its reasons for refusing this leave. In the circumstances I find that the changes proposed by the respondent in relation to accessing this leave will be included in the 2013 Agreement. However, I decline to include the provisions relating to an employee seeking to appeal an adverse decision in the 2013 Agreement because I find that the 2013 Agreement's dispute settlement procedure adequately covers this situation.

(18) If access to professional development leave is refused that employee be entitled to payment in lieu of any unused entitlement

288 The respondent is seeking payment of an employee's professional development leave entitlement remaining when an employee's application for professional development leave has been denied. This is to be paid at the end of each 12 months service but not on resignation or termination of employment. Employees are required to undertake professional development on an annual basis in order to maintain their AHPRA registration. Evidence was given in the proceedings that from time to time access to professional development leave is not always available through circumstances beyond the applicant's control and every endeavour is made by the applicant to ensure that nurses access professional development opportunities. The extent to which employees have had specific requests to undertake professional development denied was based on hearsay evidence given by the respondent which was disputed by the applicant. It is therefore unclear what the magnitude of this problem may be with respect to accessing professional development leave. Given the lack of information about the extent to which this is a problem for employees, I am not persuaded that this claim should be granted.

(19) Employees to receive rural gratuity payments as well as the payment of a district allowance

289 The respondent is seeking that rural gratuity payments continue to be paid to eligible employees in addition to a district allowance. There was no evidence before the Commission of any hardship currently being experienced by employees in country areas because they do not receive both the payment of rural gratuities and the district allowance. Apart from not filling 10 graduate positions within WA non-metropolitan area hospitals last year there was also no evidence of any difficulties

attracting and retaining employees in country areas or if the granting of this claim would be of any effect and would assist with the attraction and retention of nurses in country areas. This claim is rejected.

(20) 100% salary maintenance for redundant employees

290 The respondent is seeking a new provision be included in the 2013 Agreement that existing classification and wage rates be paid to employees who are redeployed as well as no employee being required to accept alternative employment in the private sector upon being made redundant or an employee being required to accept being made redundant. Wage maintenance is to include any shift allowance paid on a regular basis or relieving allowance paid continuously for 12 months. After carefully considering the parties' submissions, I am not prepared to incorporate the changes proposed by the respondent as there was no compelling evidence justifying the inclusion of this new provision. Notwithstanding this, I note the respondent's concerns about foreshadowed major changes to the WA health system given that new hospitals will soon commence operating. Given these proposed changes to the applicant's workforce in light of the new private hospitals commencing operation in the near future and resultant reductions in the number of nurses employed by the applicant, I will require the applicant to provide to the respondent every six months during the life of the 2013 Agreement its intentions with respect to redundancy and redeployment for employees covered by this agreement and details of its proposals to redeploy specific employees as well as the quantum of wage maintenance proposed for relevant employees. If there are any issues arising from this, either party can seek the assistance of the Commission to deal with these matters outside of the terms of the 2013 Agreement. The parties are required to negotiate the terms of the manner in which these discussions will occur to be included in the 2013 Agreement.

(21) Employees injured at work to be paid normal earnings and these payments to apply to employees over the age of 65 years

291 The respondent is seeking a new provision that employees in receipt of workers' compensation are to be paid their normal earnings, which includes the average of shift and weekend penalties and on call payments received in the 13 weeks prior to the date of their injury. These payments are to apply to employees aged 65. I find that there is insufficient information before the Commission in support of including this provision in the 2013 Agreement or that this claim relates to current difficulties employees are experiencing with respect to this issue. This provision will not therefore be included in the 2013 Agreement.

(22) Parking charges

292 The respondent is seeking a clause that the applicant provide safe and secure parking to all employees located within a reasonable distance of their workplace and that parking charges applicable as at 1 January 2010 be reinstated and any parking charge increases be limited to the CPI of the previous quarter. After carefully considering this claim I decline to include any provision related to parking in the 2013 Agreement at this point in time. The provision relating to providing safe and secure parking is vague and in my view is impossible to enforce even if it was to be included in the 2013 Agreement. I am concerned about the proposed increases to parking costs that will apply to employees who work in Category A hospitals, in particulars those employees who have no or limited access to public transport. It is clear that the increases proposed by the applicant for these hospitals are significant and I find that employees will find future parking costs difficult to meet at these hospitals given the rate of the foreshadowed increases. It is also the case that many nurses have no choice but to use private transport given the nature of the shifts some nurses are required to work. In the circumstances I require the applicant to review the proposed remaining staff parking increases for Category A hospitals with a view to providing a mechanism for developing a revised and more reasonable fee structure and the rationale of any proposed fee increases. If the parties are unable to reach agreement with respect to determining revised staff parking charge increases for Category A hospitals within 14 days of the date of these reasons for decision, I will list this matter for further consideration to hear from the parties about whether the issue of parking costs at Category A hospitals should be included in the 2013 Agreement and if so what if any process should be put in place for dealing with this issue.

(23) Establishment of a housing consultative committee

(24) Establishment of a graduate nursing consultative committee

(25) Establishment of a policy standardisation consultative committee

293 The respondent is seeking the inclusion of three new consultative committees in the 2013 Agreement. One dealing with the availability and standard of rural housing issues, another dealing with employing graduate nurses and the third committee covering standardisation of policies throughout the WA health service. Evidence was given by both parties that the issues relevant to what the proposed consultative committees will deal with and negotiate on are issues where dialogue between the parties already takes place. What was in contest between the parties is the manner in which any future dialogue with respect to these issues should take place and whether the committee structures proposed by the respondent would be effective. I am not convinced that consultative committees proposed by the applicant are the appropriate mechanisms for dealing with these three matters however I see merit in the parties continuing to liaise and consult about these issues. To that end I require the parties to meet twice every 12 months during the life of the 2013 Agreement to deal with matters either party wishes to raise with respect to these three areas. I require that the parties meet within three months of the certification of the 2013 Agreement to agree on how this process will operate, who will attend the meetings and when the meetings will occur and I require the parties to agree on a clause to be included in the 2013 Agreement reflecting the mechanism for discussing these issues. The Commission will assist the parties if agreement cannot be reached as to this process.

Applicant's claims

(26) A change to portability and accessing pro rata long service leave provisions

(27) A change to parental leave provisions by creating individual clauses for maternity, adoption, other parent and partner leave and a new unpaid grandparental leave provision

294 The applicant is seeking changes to long service leave entitlements and the parental leave provisions contained in the 2010 Agreement. I am aware that there are improvements for some employees with respect to what is proposed by the applicant. However as the changes constitute, in part, a diminution of entitlements to some employees and as the Agreement states that there is to be no loss of conditions for employees covered under the 2013 Agreement the changes proposed by the applicant to these clauses are denied.

295 The parties are required to confer within 28 days of the date of these reasons for decision to prepare a schedule for the registration of the 2013 Agreement incorporating the provisions specified in these reasons.

2014 WAIRC 01235

WA HEALTH - AUSTRALIAN NURSING FEDERATION - REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT) NURSES - INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01235
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	WEDNESDAY, 8 OCTOBER 2014, WEDNESDAY, 15 OCTOBER 2014
DELIVERED	**:**	FRIDAY, 31 OCTOBER 2014
FILE NO.	**:**	AG 19 OF 2013
BETWEEN	**:**	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, THE PEEL HEALTH SERVICES BOARD, WA COUNTRY HEALTH SERVICE AND THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY Applicant AND AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH Respondent

Catchwords	**:**	Industrial Agreement - Application for registration of an Agreement - Application for an order as to specified matters on which agreement has not been reached - Reasons for decision previously issued - Further hearing relating to parking and nurse practitioner claims - Further reasons for decision issued - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 6(ae), s 6(af), s 6(c) s 7, s 23(1), s 41, s 41(1), s 42G, s 42G(2), s 42G(3) and s 42G(5) *Labour Relations Reform Bill 2002*
Result	**:**	Order issued
Representation:		
Applicant	**:**	Ms K Worlock (of counsel), Ms T Sweeney and Mr D Matthews (of counsel)
Respondent	**:**	Ms V Loveridge and Ms E Hadrys
Intervener	:	Mr D Matthews (of counsel) on behalf of the Minister for Commerce

Case(s) referred to in reasons:

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd (2002) 118 FCR 177

Electrolux Home Products Pty Ltd v The Australian Workers' Union (2004) 221 CLR 309

Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch) (2004) 84 WAIG 694

Hotcopper Australia Ltd v Saab [2002] WASCA 190; 82 WAIG 2020

R v Portus; Ex parte Australia and New Zealand Banking Group Ltd (1972) 127 CLR 353

The Executive Director Department of Education (2010) 90 WAIG 615

Further Reasons for Decision

1 On 30 July 2014 reasons for decision issued with respect to this application. Two outstanding matters, claims relating to parking costs and the classification level of nurse practitioners, were listed for further hearing and determination on 8 and

15 October 2014. At the end of the hearing the parties were advised that the matter would be adjourned to allow the Commission time to consider the submissions and evidence relating to the issue of parking. A Minute of Proposed Order issued later that afternoon and the parties were advised that further reasons for decision with respect to the parking costs claim and the classification of nurse practitioners would issue at a later date and on 16 October 2014 the Commission registered the 2013 Agreement.

2 The clause with respect to parking is as follows:

67. PARKING

(1) Daily parking fee charges for employees covered by the Agreement working at Category A hospitals shall be $5.50 per day.

(2) This rate will be increased on 1 July in each subsequent year for the life of the Agreement in line with Consumer Price Index movements for Perth (All Groups) in the March quarter, as determined by the Australian Bureau of Statistics.

Category A hospitals include RPH (Wellington Street), Sir Charles Gairdner Hospital (QEII site), Fiona Stanley Hospital and the Children's hospital (QEII site).

3 The subclause relating to the classification of nurse practitioner in Clause 14. - Salaries and Classifications is as follows:

(7) **Nurse Practitioners**

(a) A Nurse Practitioner will be classified as a Senior Registered Nurse.

(b) The Employer will determine the appropriate classification level following an assessment of the work value associated with the scope of practice of the position.

(c) The classification of a Nurse Practitioner will be not less than Senior Registered Nurse Level 3.

(d) To avoid doubt, a dispute about whether an assessment of the work value associated with the scope of practice of a particular nurse practitioner position has been correctly made:

(i) is a dispute for the purposes of Clause 60 - Dispute Resolution Procedure of this Agreement.

(ii) will not preclude the Employer proceeding to make an appointment to a Nurse Practitioner position.

(e) (i) During the life of this agreement the parties will negotiate descriptors of the role for each classification of Nurse Practitioner in line with the current Senior Registered Nurses classification structure.

(ii) Should the parties be unable to reach agreement on a classification structure by 31 March 2016, this issue will be arbitrated by the Commission.

4 Following are my further reasons for decision in relation to this application.

Objection to applicant's representative appearing to deal with issues of merit

5 The respondent objected to Ms Worlock, who is a legal practitioner, appearing for the applicant. The Commission had already determined that the applicant was able to be represented by a legal practitioner only with respect to legal issues relevant to this matter. The basis for making this decision is contained in the order which issued on 5 February 2014 (see 2014 WAIRC 00083; 94 WAIG 138).

6 After hearing from the parties, the Commission reluctantly granted leave for Ms Worlock to appear for the applicant on issues of merit. The Commission did so in the interests of bringing this application to finality in a timely manner and took into account that Ms Worlock would not make any submissions or cross-examine the applicant's witness about legal issues. Additionally, no disadvantage was raised by the respondent if Ms Worlock appeared.

Classification levels of nurse practitioners

7 In response to the Commission's request, the parties completed a statement of agreed facts containing the background to the creation of the position of nurse practitioner in WA and the qualifications required of persons appointed to this position. The parties confirmed that there is currently no classification structure for nurse practitioners containing the duties required of a nurse practitioner at each level and that a nurse practitioner's classification level is determined on a case by case basis. In my view a nurse practitioner classification structure would assist in determining the appropriate classification of a nurse practitioner when a person is appointed to this position and would be the appropriate mechanism for dealing with the respondent's claim with respect to this issue. A provision will therefore be included in the 2013 Agreement requiring the parties to negotiate a detailed classification structure for nurse practitioners and the relevant salary for each classification in line with current pay rates for each level. If the parties are unable to reach agreement on this issue three months prior to the expiration of the 2013 Agreement the Commission will arbitrate any outstanding issues.

Parking

8 In the initial reasons for decision the Commission required the parties to discuss the possibility of reducing parking fees for employees who park at Category A hospitals. After several conferences and discussions between the parties and after the respondent put draft proposals to the applicant for consideration the applicant declined to review its position. The applicant's position continues to be that this claim does not relate to an industrial matter and the proposed staff parking fees should be those contained in its Information Circular dated 7 February 2013. This includes parking fees at Category A hospitals rising from $4.80 per day in 2013 to $7.50 per day in 2017. The respondent relies on the claim contained in the matters referred for

hearing and determination. The Commission gave the parties a further opportunity to deal with the respondent's proposed clause.

Applicant's request to adduce new evidence

9 The applicant sought leave to present additional evidence about the issue of parking and parking fees related to Category A hospitals through Ms Gretta Parry. The respondent objected to Ms Parry giving evidence as some of the information contained in Ms Parry's witness statement was new evidence which should not now be considered as part of this application.

10 The applicant indicated that Ms Parry's evidence relates to a new submission it would make about the complexity of setting fees at Category A hospitals and the impact of any change to the current proposed fee structure. In the initial reasons for decision the Commission indicated that it would hear further from the parties on the issue of parking costs if parking fee increases could not be agreed between the parties. As leave was granted to the parties to this effect and as the applicant wanted to rely on additional information which could in my view assist the Commission in its deliberations with respect to this matter, I formed the view that it would be appropriate to allow Ms Parry to give evidence about the issue of parking fees. The respondent was given the opportunity to provide evidence in response but chose not to do so.

Evidence

Applicant

11 Ms Parry is the applicant's Acting Manager Metropolitan Access and Parking Department. Ms Parry gave evidence that legislation allows the Department to set parking fee rates at its hospitals. The parking rates in place at public hospitals and the Queen Elizabeth II Medical Centre (QEII) campus are then set based on delegated legislation. The Paxon Group was engaged to conduct a review of the Department's parking services in 2013. This review, which included an analysis of parking costs across the Department, shows that the cost of providing parking at Category A hospitals is significantly higher than the fees charged to users.

12 At RPH the process of staff paying parking fees is applied in the same way to all staff and any change to the RPH parking system to enable different staff parking fee charges would require a new system. The QEII Trust manages the campus at Sir Charles Gairdner Hospital and the applicant has a contract with Capella to provide parking at this hospital based on a predetermined parking fee structure. The parking fees currently paid by employees at Sir Charles Gairdner Hospital are paid using a 'Smart Parker' card. The fees charged to staff using this hospital car park are less than the cost of providing parking and the additional cost of this service is paid for by the WA Government.

Submissions

Applicant and Minister for Commerce

13 The Minister for Health and the Minister for Commerce (the Ministers) argue that the Commission does not have jurisdiction to include any claim about this issue in the 2013 Agreement. Section 23(1) of the Act requires that the Commission can only decide the respondent's claim about parking costs if this issue relates to an industrial matter. In this instance this is not the case as the dispute between the parties over the setting of parking fees is a commercial one between the applicant and the respondent and relates to the management of a commercial enterprise which is an on-site management issue. This issue therefore does not fall within the definition of an industrial matter (see ***R v Portus; Ex parte Australia and New Zealand Banking Group Ltd*** (1972) 127 CLR 353 and ***Hotcopper Australia Ltd v Saab*** [2002] WASCA 190; 82 WAIG 2020).

14 The Ministers submit that the respondent cannot rely on the decision of ***Hanssen Pty Ltd v Construction, Forestry, Mining and Energy Union (Western Australian Branch)*** (2004) 84 WAIG 694 (***Hanssen***) as it is wrong. The Full Bench in ***Hanssen*** relied on a case to allow a non-industrial matter to be incorporated in an agreement but this case was overturned by the High Court. In turn reliance on ***Hanssen*** by the Commission in Court Session (the CICS) in ***The Executive Director Department of Education*** (2010) 90 WAIG 615 (***Education case***) was in error. The decision relied on in ***Hanssen*** was that of the Full Court of the Federal Court in ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd*** (2002) 118 FCR 177. This decision was overturned by the High Court in September 2004, six months after ***Hanssen*** issued (see ***Electrolux Home Products Pty Ltd v The Australian Workers' Union*** (2004) 221 CLR 309 (***Electrolux***)). In this case the High Court held that the federal system's agreement making provisions, which are equivalent to the WA scheme, do not allow an industrial agreement to be registered if it contains provisions relating to non-industrial matters (see [16] - [17] (Gleeson CJ), [108] - [111] (McHugh J) and [156] (Gummow, Hayne and Heydon JJ)). In this decision the High Court found that the then AIRC could only certify agreements relating to matters pertaining to the employment relationship. The Commission may therefore only register agreements containing industrial matters or for the prevention of disputes relating to industrial matters. As the High Court held that for an agreement to be registered it must only relate to matters pertaining to the employment relationship, this rules out any argument that additional matters may be included if they are not specifically excluded.

15 The Ministers maintain that the fee payable for parking by nurses is not an industrial matter as it does not have the necessary connection to the employment of nurses or to the relationship between the applicant as employer and nurses as employees. The fee paid for parking is no more an industrial matter than the amount of the fee payable for public transport to hospitals or any other cost incurred by a nurse incidental to getting to work. The Ministers argue that there has been no agreement at any stage that this dispute be regarded as an industrial matter. No order related to parking fees made by the Commission will be binding upon the QEII Trust, which has control over parking fees at QEII, as it is not the employer of employees subject to the 2013 Agreement. The bodies which set parking fees may have decided to charge nurses and other staff a reduced fee to enable easier access to the site by these persons but this is a management of site decision and not a decision relating to an employee's employment. Even if the issue of setting parking fees comes within the definition of industrial matter, it is not appropriate for the Commission to enter into the area of setting fees that may be charged for parking at public hospitals. Setting parking fees

at public hospitals is a complex and separately legislated management of site issue, responsibility for which does not even necessarily reside with the applicant.

16 The applicant continues to argue that the decision to refer this matter to the Commission under s 42G was not consensual and despite the joint referral to the Commission under s 42G it does not want the Commission to make orders in relation to the fees payable by nurses for parking.

17 The applicant argues that the clause relating to parking should not be included in the 2013 Agreement as there is no evidence that the rate of increases to parking fees at Category A hospitals causes any difficulty for employees. The increases proposed by the applicant are consistent with parking expenses in high volume areas such as the City of Perth and the applicant submits that the proposed parking increases are reasonable in comparison to alternative transport options, including public transport and City of Perth parking costs.

18 The applicant argues that the respondent amended its original parking costs claim after the initial reasons for decision issued. The Commission cannot deal further with this issue as s 42G of the Act does not allow the Commission to deal with a claim which is different to the initial position put by a party. The revised claims put by the respondent, which were not included in the application at first instance, represent new claims and extend the issues in dispute beyond what was agreed to by the applicant.

19 A parking provision regulating Category A hospitals cannot be quarantined to one occupational group and flow on would be inevitable. The current parking systems across RPH, QEII campus and other public hospital sites do not distinguish between occupational groups and even if the parking systems were capable of distinguishing between occupational groups, it would not be equitable to charge nurses a different rate to other groups such as hospital support workers or salaried officers some of whom are shift workers. The 14% wage increase over three years to employees covered by the 2013 Agreement also recognises the extent of the parking cost increases.

20 The applicant submits that the Commission should not intervene in this matter as parking fees are reviewed by Parliament. If Parliament had intended the Commission to regulate parking fees at public hospitals it would not have provided an alternative legislative process prescribing a review of parking fees. Further, Parliament would not have given the responsibility of parking fees to subsidiary legislation had it intended or anticipated such matters could be regulated by the Commission. Rates to be included in the by-laws are determined after analysing a range of factors. The Paxon Report dated 29 July 2013 demonstrates there is considerable analysis which accompanies the determination of parking fees including a review of direct costs and indirect costs of parking and the allocation of fees to staff and visitors. The applicant is currently subsidising the parking fees for staff to allow for a phasing in of fee increases. Absent this current subsidy, staff at Category A hospitals would already be paying $7.50 per day. This temporary subsidy is in place to ensure staff have an adequate opportunity to become accustomed to the increased rates.

21 The applicant argues that the provisions relating to parking relied on by the respondent in other agreements registered by the Commission do not relate to the setting of parking fees, which is the dispute before the Commission. Any new provisions in an industrial agreement should be inserted with great caution.

Respondent

22 The respondent argues that the Commission has jurisdiction to include a clause relating to parking fees in the 2013 Agreement. The respondent argues that parking is an industrial matter as it is a matter affecting or relating or pertaining to the work, privileges, rights, or duties of employees. The unsociable hours that the majority of nurses and midwives work, starting and finishing shifts at 7.00 am and 9.00 pm, means that parking is an important work related matter. If employees were unable to park at work then many would not be able to work these shifts. The definition of industrial matter also includes 'any matter of an industrial nature the subject of an industrial dispute'. Prior to the Agreement being concluded on 24 February 2013 the issue of parking was in dispute and the resolution of this issue was referred, by consent, under s 42G of the Act as a disputed issue. The respondent also relies on parking being included in other agreements registered by the Commission in support of its claim that parking is an industrial matter.

23 The respondent argues in any event that it is unnecessary for the Commission to decide whether parking is an industrial matter. When s 7 is read in conjunction with the terms of s 23(1) of the Act the Commission's jurisdiction to deal with this issue is not excluded where the Commission has been asked to exercise its jurisdiction under s 42G. What is to be decided by the Commission relates to a specified matter on which agreement between the parties has not been reached and the parties requested the Commission arbitrate this issue under s 42G of the Act. Section 23(1) of the Act states that this section is to be construed 'subject to' the Act generally. Where there is a conflict between a general and specific provision in the Act, the specific provision prevails. In this case the specific provisions are those contained in s 42G which allow for consent arbitration on a disputed matter, which does not necessarily involve an industrial matter. As s 42G is a specific provision of the Act that allows the Commission to make orders on matters the parties have not reached agreement, which includes parking costs, the Commission can therefore make an order in relation to parking regardless of whether this issue is an industrial matter.

24 Notwithstanding the terms of s 41(1) of the Act, the provisions of s 42G(5) provide the mechanism for the inclusion of the Commission's decision about the specified matters to be included in the 2013 Agreement. The issue of whether parking is an industrial matter is therefore irrelevant as this is a joint application made under s 42G and parking is one of the specified matters referred to the Commission for arbitration.

25 The respondent maintains that parking costs can be included in the 2013 Agreement as there is no requirement that all provisions of a proposed industrial agreement be industrial matters. The Commission is being asked to make orders under s 42G on specified matters to be included in an agreement to be registered under s 41 of the Act. Section 41(1) governs when an agreement may be made and does not exclude non-industrial matters being in an industrial agreement. The respondent relies on the authority of ***Hanssen*** whereby the Full Bench stated the following with respect to what can be included in an industrial agreement pursuant to the terms of s 41(1) of the Act:

> In our opinion, an agreement under s41 of *the Act* and enterprise order under s42I of *the Act*, which imposes on the parties the provisions of an agreement which could have been made between them, can contain provisions which are not industrial matters. We say that because s41I(c) and (d) limit enterprise orders to what might be provided for in an industrial agreement. However, s41 authorises the registration of an industrial agreement as defined in s7 of *the* Act 'with respect to any industrial matter'. It does not by those words exclude non-industrial matters, and, in any event, that the agreement goes further than industrial matter and we shall refer to that later [273].

26 This was confirmed in the ***Education case*** where the CICS discussed the operation of s 42G and the preconditions for issuing an order under s 42G. The three conditions to be met as discussed by the CICS in the ***Education case*** at [123] have been met in this matter. These conditions are:

- the parties reached agreement on some but not all of the matters for inclusion in the industrial agreement;
- the parties made an application for the registration of the industrial agreement; and
- the parties made an application for an order under s 42G as to specified matters on which agreement had not been reached.

27 The respondent also rejects the applicant's claim that it cannot rely on the authority of ***Hanssen*** and the ***Education case*** and argues that the Commission can make a decision with respect to parking fees given the terms of s 42G(2) and s 42G(3) of the Act which was confirmed in the ***Education case***:

> For the purposes of s 42G(3), the Commission may make an order 'in relation to the matters specified by the parties in the application under s 42G(1)(c) of the Act. The phrase 'in relation to' is one of considerable breadth: *Oceanic Life Ltd and Anor v Chief Commissioner of Stamp Duties* (1999) 168 ALR 211. There needs to be some connection between the order and the subject matter of the specific matters referred.
>
> In these applications, the 'specified matters' referred to the Commission in the Agreement for Arbitration are the rates of pay for EAs, school Cleaners and Gardeners and other general classifications to be covered by the 2010 Agreements. The Commission is thus not limited to the 'claims' made by the parties in terms, as long as an order arising from s 42G(3) concerns the wages to be paid to the affected employees. For the purposes of making a s 42G(3) order, the Commission may have regard to 'any matter it considers relevant': s 42G(4) of the Act. This is subject to s 26(1), which specifies to what the Commission must have regard in making an order [128] – [129].

28 The respondent argues that the Explanatory Memorandum accompanying the *Labour Relations Reform Bill 2002* assists in its claim that non-industrial matters can be included in an industrial agreement. This memorandum states that the intention of the introduction of s 42G was to give the Commission the power in specified circumstances to assist the process of collective bargaining, with the agreement of the parties and at their request, by arbitrating on non-agreed matters that would otherwise lock the parties in dispute indefinitely.

29 The Paxon Report does not have any impact on the setting of parking fees at Category A hospitals. The Department of Health Operational Circular numbered 0131/13 dated 7 February 2013 (Document 75) outlines the fees to be charged to 2017 and these fees were set by the Department in 2010. Whilst there has been some tinkering with the categories of various hospitals and some time frames have been extended, the fees remain the same.

30 The respondent submits it has not changed its position in relation to its original parking fee claim after reasons for decision issued on 30 July 2014. Rather the respondent sought to negotiate with the applicant on parking increases and alternative proposals were put by the respondent. These were not new claims but changes to the respondent's original position in an attempt to settle the dispute between the parties.

31 The respondent claims the applicant wasted time before and after 30 July 2014 pretending to negotiate on this issue when it had no intention to do so. Some adjustment should therefore be made to decrease the rate currently payable from the date of registration of the 2013 Agreement. Future increases should also be limited to the CPI each year. The issue of flow on is not relevant given that the Commission dealt with this matter during the hearing and this claim is a no cost item to the applicant.

32 If the Commission decides that this matter is unable to be resolved by including a clause containing parking fees for Category A hospitals in the 2013 Agreement, the respondent submits that the matter could be accommodated under an allowance or a loading to compensate nurses and midwives working at Category A hospitals who use parking.

Consideration

33 Notwithstanding the terms of the Agreement, which provided that all matters not agreed between the parties be arbitrated, and the issue of the rate of parking fees at Category A hospitals being included in the joint application for arbitration, the applicant and the Minister for Commerce argue that the Commission cannot include a clause relating to parking costs in the 2013 Agreement as this issue is not an industrial matter as defined in the Act.

Is the issue of fees charged to the applicant's employees who park at Category A hospitals an industrial matter?

34 I find that the Commission has jurisdiction to include a clause relating to the issue of parking fees at Category A hospitals in the 2013 Agreement. I have reached this conclusion as I find that the dispute about the level of parking fees to apply to the applicant's employees who park at Category A hospitals and who are subject to the 2013 Agreement is an industrial matter as defined in several sections of this definition in s 7 of the Act.

35 Part II, Division 2B of the Act deals with industrial agreements and their registration. Section 41(1) of the Act provides for the making of industrial agreements in the following terms:

41. Industrial agreements, making, registration and effect of

(1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of disputes, disagreements, or questions relating thereto may be made between an organisation or association of employees and any employer or organisation or association of employers.

36 The definition of industrial matter in s 7 of the Act is as follows:

industrial matter means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —

(a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;

(b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

(c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;

(ca) the relationship between employers and employees;

(d) any established custom or usage of any industry, either generally or in the particular locality affected;

(e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;

(f) in respect of apprentices, these additional matters —

(i) their wage rates and, subject to the *Vocational Education and Training Act 1996* Part 7 Division 2, other conditions of employment; and

(ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the *Vocational Education and Training Act 1996* Part 7 Division 2, whether at their employers' workplaces or not; and

(iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;

(g) any matter relating to the collection of subscriptions to an organisation of employees with the agreement of the employee from whom the subscriptions are collected including —

(i) the restoration of a practice of collecting subscriptions to an organisation of employees where that practice has been stopped by an employer; or

(ii) the implementation of an agreement between an organisation of employees and an employer under which the employer agrees to collect subscriptions to the organisation;

[(h) deleted]

(i) any matter, whether falling within the preceding part of this interpretation or not, where —

(i) an organisation of employees and an employer agree that it is desirable for the matter to be dealt with as if it were an industrial matter; and

(ii) the Commission is of the opinion that the objects of this Act would be furthered if the matter were dealt with as an industrial matter;

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

(j) compulsion to join an organisation of employees to obtain or hold employment; or

(k) preference of employment at the time of, or during, employment by reason of being or not being a member of an organisation of employees; or

(l) non-employment by reason of being or not being a member of an organisation of employees; or

(m) any matter relating to the matters described in paragraph (j), (k) or (l);

37 An industrial matter is defined as any matter affecting, relating or pertaining to the work of employees and the duties they undertake. I find that this dispute falls within this definition of an industrial matter as I find that the issue of parking fee rates to be paid by employees arises out of and is related to the work and duties they are required to perform. Some employees working at Category A hospitals can only attend work to undertake their duties using a private vehicle due to the applicant's requirement that employees work shifts covering 24 hours a day, seven days a week. As some employees working at Category A hospitals are required to commence and finish shifts outside standard work timeframes they have no choice but to drive vehicles to work and park close by in the parking facilities provided by the applicant or arranged by the applicant. This issue, which relates to what the appropriate quantum of fees employees are required to pay to attend work when they use the parking facilities provided by or organised by the applicant in the context of the work and duties required of employees to be performed at Category A hospitals, therefore falls within the definition of an industrial matter.

38 An industrial matter is defined as a matter affecting, relating or pertaining to the salary of an employee. I find that fees employees are required to pay to park at Category A hospitals, which I have found is connected to an employee undertaking his or her normal duties, is an industrial matter as the level of fees employees are required to pay affects and relates to an employee's salary.

39 An industrial matter is defined as any matter affecting, relating or pertaining to the relationship between employers and employees. I find that this is a dispute which is caught by this definition of industrial matter as the dispute about the parking fees to be charged to employees arises out of, pertains to and has affected the relationship between the applicant and its employees. I find that the rate of increase in parking fees is in the applicant's control and arises due to the actions of the applicant (see Exhibit A1.13, attachment GP12). I find that the applicant's decision to increase parking fees at an accelerated rate has created difficulties and disputation between the applicant and the respondent's members for a lengthy period and culminated in the respondent's members taking industrial action in February 2013 over this and other matters. I find that this disputation and the inability of the parties to reach agreement on the level of fees employees are charged to park at their workplace, which I have already found relates to the work undertaken by employees at Category A hospitals, relates to the relationship between the applicant as employer and its employees.

40 In ***Hanssen*** the Full Bench discussed whether a particular clause fell within the definition of industrial matter. The Full Bench found that a matter of an industrial nature in dispute between the parties which has the qualities of an industrial matter can be an industrial matter as defined even if it is an issue not referred to as an industrial matter in the definition of industrial matter in the Act. The Full Bench stated the following:

> We now refer to paragraph (i) of the definition of 'industrial matter', another new paragraph of the definition just as definition (ca) is. In our opinion, this includes a matter of an industrial nature. It was submitted by Mr Le Miere that a matter of an industrial nature can only mean an 'industrial matter'. That however, would mean that paragraph (i) of the definition of 'industrial matter' has no meaning because a matter affecting an industrial matter, whether there is a dispute about it or not, is by definition within jurisdiction. A matter 'of an industrial nature' is one having the qualities of an industrial matter as otherwise defined without necessarily being one (see the *Macquarie Dictionary*, 3rd Edition and the definition of 'of or in the nature'). Therefore, a matter of an industrial nature which is wide and inclusive except for some special exceptions actually recited relating to organisations and freedom of association, is a matter which relates to matters arising out of or connected with industry as defined in employers or employees without being the direct sort of matter or the restricted sort of matter which an industrial matter otherwise as defined is. The second and major determining indicator is that such a matter must be the subject of an industrial dispute or the subject of a situation that might give rise to an industrial dispute. Therefore, given the objects of *the Act* which are directed to providing the means for settlement of disputes, inter alia, if it is sufficient that a matter has as it were some mark of the industrial about it, giving it a quality of the industrial, that enables it to be brought within the jurisdiction of the Commission where it is the subject of an industrial dispute or where it is the subject of a situation that might give rise to an industrial dispute (see paragraph (i) of the definition) [269]. [my emphasis]

41 An industrial matter is defined as any matter of an industrial nature the subject of an industrial dispute. I find that this is a dispute which has an industrial character and is therefore an industrial matter as defined. It is not in contest and I find that the parties are in dispute about the issue of the fees to be charged at Category A hospitals. I also find that this matter is one which has an industrial quality as parking fee costs incurred by employees, which are set by the applicant, are connected to the relationship between the applicant and its employees given the work the applicant's employees are required to undertake in the industry within which these employees work.

42 The Ministers argue that the respondent cannot rely on the Full Bench decision of ***Hanssen*** to include a non-industrial matter in an industrial agreement as the Full Bench relied on the decision of ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd*** which was overturned by the High Court in ***Electrolux***. The Ministers submitted that this was so as the High Court determined that the AIRC, and therefore the Commission, is unable to register an industrial agreement containing clauses not pertaining to the relationship between an employer and its employees. In my view the decision of ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd*** referred to in ***Hanssen*** by the Full Bench is not relevant in this instance as I have found the issue in dispute is an industrial matter as defined in the Act and a clause related to this matter can be included in the 2013 Agreement.

43 I find that it is appropriate to include a clause containing parking fees to be paid by the applicant's employees parking at Category A hospitals and that the rate of increases to these fees should be less than that proposed by the applicant. I have already determined that the provisions related to the applicant providing safe and secure parking to all employees located within a reasonable distance to the workplace will not be incorporated into the 2013 Agreement and expressed my reasons for reaching this conclusion. I also noted in my initial reasons for decision that I was concerned about the rate of parking cost increases proposed by the applicant for employees covered by the 2013 Agreement working at Category A hospitals and these concerns remain. In this context, and when taking into account relevant objects of the Act including s 6(ae), (af) and (c) and s 26 considerations, I find that it is appropriate to include a clause in the 2013 Agreement which provides that parking fee increases for employees covered by the 2013 Agreement parking at Category A hospitals should be lower than those proposed by the applicant. I find that the rates I have decided to include in the 2013 Agreement are appropriate and reasonable. I find that the increases included in the 2013 Agreement will not place undue financial hardship on employees using the parking facilities at Category A hospitals and I find that the applicant will not be adversely affected in any substantial way by the lower rate of parking fee increases included in the 2013 Agreement. In reaching this conclusion I take into account that the fees included in the 2013 Agreement will rise annually during the life of the 2013 Agreement and that employees parking at Category A hospitals will continue to pay more than some users and less than other employees who park at other hospitals.

44 I reject the applicant's claim that logistical issues prevent one group of employees having a different parking fee structure to that of other employees using Category A hospital car parks. Patrons of the car parks at Category A hospitals pay varying rates

of fees and the payment of parking fees varies from individual to individual. I therefore find that it is possible that separate parking fees for nurses using Category A hospitals can be accommodated within this process.

45 I find that the salary increase granted to employees covered by the 2013 Agreement should not be taken into account to offset the parking fee charges paid by employees parking at Category A hospitals. In reaching this conclusion I take into account that the Agreement provides for salary increases over and above the determination of the non-agreed issues to be arbitrated, which includes the level of parking fees to apply at the applicant's hospitals. It is also the case that employees using Category A hospital car parks who pay more than some other employees to park at their workplace, will receive the same salary increases as other employees covered by the 2013 Agreement.

46 I reject the applicant's claims that the respondent changed its position with respect to parking after the reasons for decision issued thereby invalidating their claim with respect to this issue as I find that this claim has no substance. The respondent posed alternative fees and rates of increase on a without prejudice basis during conciliation with a view to reaching agreement with the applicant on this issue and did not formally resile at any stage from its original position.

47 I find that the resolution of this claim does not involve the setting of parking fees at public hospitals as claimed by the applicant. This claim relates to what is the appropriate fee level for employees the subject of the 2013 Agreement to pay for parking at Category A hospitals, which I have found to be a work related issue.

48 The applicant claims that as he is not in charge of providing parking at QEII any provision in the 2013 Agreement setting parking costs will be of no effect. The clause contained in the 2013 Agreement provides the parking fees employees covered by the 2013 Agreement will pay for parking at Category A hospitals and the order relating to this issue is binding on the applicant. How the applicant ensures that the fees as specified by the Commission in the 2013 Agreement apply to employees using parking facilities at QEII is a matter for the applicant to negotiate with the QEII Trust.

49 I find that there is no prospect of flow on with respect to this determination. The parking fee increases included in the 2013 Agreement are limited to specific hospitals and to one occupational group and the onus is on other occupational groups of employees to argue parking fee levels on a case by case basis.

2014 WAIRC 01142

WA HEALTH - AUSTRALIAN NURSING FEDERATION - REGISTERED NURSES, MIDWIVES, ENROLLED (MENTAL HEALTH) AND ENROLLED (MOTHERCRAFT) NURSES - INDUSTRIAL AGREEMENT 2013

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, THE PEEL HEALTH SERVICES BOARD, WA COUNTRY HEALTH SERVICE AND THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY
	APPLICANT
	-v-
	AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 16 OCTOBER 2014
FILE NO/S	AG 19 OF 2013
CITATION NO.	2014 WAIRC 01142

Result	Order issued
Representation	
Applicant	Ms C Reid, Mr C Gleeson, Ms K Worlock (of counsel), Ms T Sweeney, Mr D Matthews (of counsel) and Ms R K Hill (of counsel)
Respondent	Ms V Loveridge, Ms E Hadrys and Ms F Dimostovski
Intervener	Mr G T W Tannin SC, Mr D Matthews (of counsel) and Ms R K Hill (of counsel) on behalf of the Minister for Commerce

Order

HAVING heard Ms C Reid, Mr C Gleeson, Ms K Worlock (of counsel), Mr D Matthews (of counsel) and Ms R K Hill (of counsel) on behalf of the applicant, Ms V Loveridge, Ms E Hadrys and Ms F Dimostovski on behalf of the respondent and Mr G T W Tannin SC, Mr D Matthews (of counsel) and Ms R K Hill (of counsel) intervening on behalf of the Minister for Commerce, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (the Act) hereby orders:

1. THAT leave is granted for the Minister for Commerce to intervene and be represented by a legal practitioner to make submissions on legal issues relevant to s 6 and s 26 considerations and those matters relied upon by the Minister for Commerce when he sought leave to intervene.

2. THAT leave is granted for Ms Kelly Worlock to appear on behalf of the applicant with respect to issues of merit.

3. THAT leave is granted to the applicant to rely on additional evidence about parking fees.

4. THAT pursuant to the requirements under s 42G(2) of the Act the *WA Health – Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2013* include the following provisions:

   (a) liberty to apply is granted to the respondent during the life of the 2013 Agreement to argue that the casual loading should increase to 25%.

   (b) Accrued Days Off will apply to part-time nurses and midwives working more than 41 hours per fortnight. Consequential amendments will be made to Clause 25. – Hours of Work and Rostering.

   (c) during the life of the 2013 Agreement, the parties are to negotiate descriptors for the role of each classification of nurse practitioner in line with the current senior registered nurses classification structure. If the parties are unable to reach agreement by 31 March 2016 this issue will be arbitrated by the Commission.

   (d) an allowance for Authorised Mental Health Practitioners equivalent to the Level 1 qualification allowance in Clause 19 of the 2013 Agreement.

   (e) higher duties allowance is to be paid for any period of one day or more when an employee works in any position classified higher than that employee's substantive position.

   (f) a lead apron allowance in the amount of $2 per hour or part thereof to be paid to a nurse required to wear a lead apron for each hour the requirement continues.

   (g) casual nurses on an on call roster are to be paid the same overtime rates as full time employees when recalled to work.

   (h) the commuted meal break allowance paid to a senior registered nurse is to attract the applicable shift or weekend penalty rate. This allowance can apply without the employer's agreement.

   (i) access to pro rata long service leave during the first accrual period after an employee completes seven years of continuous service.

   (j) requests for access to purchased leave will not be unreasonably refused and reasons are to be given where refused. The provisions relating to 'operational requirements' are to be removed.

   (k) requests for access to the deferred salary scheme are not to be unreasonably refused and reasons are to be given where refused. The provision relating to 'operational requirements' is to be removed.

   (l) every six months after the registration of the 2013 Agreement the applicant is to provide to the respondent its intentions with respect to the redundancy and redeployment of employees employed pursuant to the 2013 Agreement, including details of its proposals to redeploy employees as well as the quantum of wage maintenance proposed for relevant employees.

   (m) parking charges applicable to employees covered by the 2013 Agreement working at Category A hospitals will be $5.50 per day and shall be increased on 1 July for the life of the 2013 Agreement based on Australian Bureau of Statistic Consumer Price Index movements for Perth (All Groups) in the previous March quarter.

   (n) the parties are to meet within three months of the registration of the 2103 Agreement to agree on a mechanism for meeting twice in each 12 month period during the life of the 2013 Agreement to liaise and consult about the availability and standard of rural housing, the employment of graduate nurses and the standardisation of policies throughout the Western Australian health service.

The Commission is satisfied that the *WA Health – Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2013* incorporates the terms set out in Order 4.

The Commission is satisfied that the 2013 Agreement meets the requirements of the Act and that it should be registered.

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

5. THAT the *WA Health – Australian Nursing Federation - Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses – Industrial Agreement 2013* in the terms of the agreement filed on 3 December 2012, as amended on 16 October 2014, be registered as an industrial agreement under s 41 of the Act in substitution for the *Registered Nurses, Midwives and Enrolled Mental Health Nurses - Australian Nursing Federation - WA Health Industrial Agreement 2010* (No AG 14 of 2011).

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

INDUSTRIAL MAGISTRATE—Claims before—

2014 WAIRC 01137

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2014 WAIRC 01137
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 1 OCTOBER 2014
DELIVERED	**:**	WEDNESDAY, 15 OCTOBER 2014
FILE NO.	**:**	M 38 OF 2011
BETWEEN	**:**	UNITED VOICE WA

CLAIMANT

AND

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

Catchwords	**:**	Failure to comply with Clause 10.3 of the Education Assistants' (Government) General Agreement 2010; whether the Claimant has proven one or more breaches of Clause 10.3 of the Education Assistants' (Government) General Agreement 2010; whether admission of the breach of Clause 10.3 of the Education Assistants' (Government) General Agreement 2010 was a contingent admission; whether a penalty is appropriate; quantum of penalty.
Legislation	**:**	*Industrial Relations Act 1979*
Instruments	**:**	Education Assistants' (Government) General Agreement 2010
Cases Referred to In Judgement	**:**	***United Voice WA v Director General, Department of Education*** [2014] WAIRC 00324 ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 ***United Voice WA v Director General, Department of Education*** [2014] WAIRC 00994 ***United Voice WA v Director General, Department of Education*** [2012] WAIRC 00778
Result	**:**	Single breach proven; penalty imposed.
Representation		
Claimant	**:**	Mr S Millman (of Counsel), instructed by Slater & Gordon Lawyers, appeared for the Claimant
Respondent	**:**	Mr D Matthews (of Counsel), instructed by the State Solicitor for Western Australia, appeared for the Respondent

REASONS FOR DECISION

Background

1 These reasons concern whether the evidence received at the Trial of this Claim establishes one or more breaches of Clause 10.3 of the *Education Assistants' (Government) General Agreement 2010* (the Agreement).

2 The Trial commenced on 18 April 2012 but was adjourned because the Claimant had failed to sufficiently particularise its Claim. The particulars as they then stood did not sufficiently disclose the case that the Respondent was called upon to answer. Consequently, the Claimant was ordered to provide further and better particulars of its Claim.

3 On or about 17 May 2012, the Claimant lodged and served its further and better particulars of claim in the form of an Amended Statement of Claim (ASC). The ASC provided some detail with respect to various alleged breaches of the Agreement. With respect to the alleged breach of Clause 10.3 of the Agreement, the Claimant said, at paragraph 3.6:

"*PARTICULARS*

…

(b) From 31 January 2011 to 5 September 2011, the Respondent breached clause 10.3 of the Agreement at least five times because the district offices were not responsible for conducting inductions:

(i) The period spans more than 2.5 terms and inductions are to be held twice each term during term time (clause 10.3).

(ii) The Applicant did not receive any notification that there were no new employees commencing in any term and that therefore the second induction in the term was not necessary.

(iii) The district offices were not responsible for conducting any inductions during this period.

(c) From 31 January 2011 to 5 September 2011, the Respondent breached clause 10.3 of the Agreement at least five times by failing to hold inductions for new employees twice each term during term time for new employees.

(i) The period spans more than 2.5 terms.

(ii) The Applicant did not receive any notification that there were no new employees commencing in any term and that therefore the second induction in the term was not necessary.

(iii) Inductions were not held twice each term during this period."

4 Paragraph 3.6(b) of the Claimant's ASC encapsulates the Claimant's case concerning the alleged breach of Clause 10.3.

5 The Claimant discontinued part of its Claim on 28 May 2012 and when the Trial resumed on 30 May 2012 the Respondent made certain admissions. In the end the Trial was concerned only with whether Clause 10.3 of the Agreement had been breached. In that regard, although the Claimant called witnesses, none of them specifically testified about individual breaches of Clause 10.3 of the Agreement. The Claimant proceeded on the basis that the several alleged breaches were capable of proof by mathematical calculation based on documentary and other viva voce evidence received.

6 At the conclusion of the Trial I determined that because the District Offices had been abolished, and there had been no agreement that the Offices would exist for the life of the Agreement, Clause 10.3 of the Agreement was incapable of enforcement. I found also that Clause 10.3 of the Agreement was no more than a mechanical provision relating to the delegation of responsibility to District Offices, and that upon those Offices being abolished, that mechanism became redundant. I concluded that, in any event, the common law defence of impossibility enabled exculpation of the Respondent.

7 My decision (see *United Voice WA v Director General, Department of Education* [2012] WAIRC 00446) was appealed to the Full Bench of the Western Australian Industrial Relations Commission (WAIRC). The decision of the Full Bench of the WAIRC was then appealed to the Western Australian Industrial Appeal Court (WAIAC). It suffices to say that the WAIAC found that I was incorrect in my conclusions, and determined that the matter should return to this Court to be dealt with in accordance with the construction it gave to Clause 10.3.

8 In its decision the WAIAC determined (see *Director General, Department of Education v United Voice WA* [2013] WASCA 287 at paragraph 33 per Pullin J with whom Le Miere J agreed) that:

"… *The Director General contravened the Agreement if she failed to comply with the promise in cl 10.3.*"

9 When the matter returned to this Court, the Respondent made an admission that she had failed to comply with Clause 10.3 of the Agreement. That admission was made on the basis that Clause 10.3 created an ongoing obligation which, if not complied with, constituted a continuing and compendious "offence".

10 The Claimant did not accept that contention. It insisted that multiple contraventions had occurred. Those contraventions were subsequently particularised in its Outline of Further and Better Particulars of Breach, lodged on 28 March 2014. The Claimant particularised 75 breaches of Clause 10.3. The Claimant contended therein that in 2011, the Respondent should have conducted two inductions in Term 1, two inductions in Term 2, and one induction in Term 3 at each of its District Offices. In subsequent submissions, the Claimant accepted that there were only 14 District Offices, and therefore the maximum number of breaches was 70.

11 On 16 April 2014, I determined (see *United Voice WA v Director General, Department of Education* [2014] WAIRC 00324 at paragraph 13), that there could not be a singular breach founded on separate omissions. I indicated that the Claimant had failed to put direct evidentiary material before me which was capable of establishing each separate breach.

12 As a consequence of that, the Claimant sought to reopen its case in order to put further evidentiary material before me. That application was refused (see *United Voice WA v Director General, Department of Education* [2014] WAIRC 00994).

Issues

13 On 1 October 2014, a hearing was conducted to resolve the following issues:

1. whether the evidence received at Trial is capable of establishing one or more breaches of Clause 10.3; and
2. if so, whether the Respondent should be cautioned, or alternatively, penalised in accordance with section 83(4)(a)(ii) of the *Industrial Relations Act 1979*.

Determination

14 The Claimant concedes that there is no direct evidence which goes to prove each alleged breach. It accepts that its case is an inferential one based on evidence and other materials before this Court. Such materials include the Annexures attached to the ASC lodged on 17 May 2012 (the ASC Annexures).

15 The Claimant asserts that there have been multiple breaches of Clause 10.3. It concedes however that it will be difficult for it to particularly identify each and every breach of Clause 10.3. It nevertheless says that there has been any number of failures to conduct inductions at District Offices, as is apparent from the number of schools and employees involved, as set out in the ASC Annexures. Further, Exhibit 1, being a document entitled "*Education networks and regions: New ways of supporting schools*", and Exhibit 7, being a document entitled "*Public education Discover a world of opportunities Education Regions*", provide evidence about the number of Regional Offices then existing. The Claimant says that when all of that information is taken together, it could be concluded that multiple breaches of Clause 10.3 have occurred. At its highest, the Claimant says that there have been dozens of breaches.

16 The Claimant contends that at its lowest, the available evidence proves at least one breach. Alternatively if the evidence does not support the finding of a breach of Clause 10.3, its breach will nevertheless have been made out on the Respondent's admission. It says that the Respondent cannot now resile from the admission made on 20 March 2014.

17 The Respondent on the other hand, submits that the Claimant has not been able to identify each breach as to time, place and circumstance. It says that the documentary evidence before the Court, including the ASC Annexures, does not go so far as to establish which schools and which employees are listed to a particular District Office. In the circumstances, the evidence is incapable of establishing one breach, let alone multiple breaches.

18 In addition, the Respondent submits that the admission made cannot be held against her in the circumstances because the admission was made in the context of a compendious breach. It was a contingent admission which is of no effect, given my finding that it cannot be a compendious breach.

19 In determining this matter, I observe that the Claimant's position as to the number of breaches of Clause 10.3 committed has shifted throughout the course of the proceedings. It has shifted from "at least five" breaches to 70 breaches. At no stage, either in the pleadings, or in the evidence, was each particular breach identified as to time, place and circumstance.

20 With respect, it seems to me that the Claimant should have, in its pleadings, identified each and every alleged breach and then called evidence to prove the same. Instead, the Claimant attempted in an overarching way to prove non-compliance with Clause 10.3, and then invited the Court to conclude, by inference and mathematical calculation, that multiple specific breaches had been proven.

21 It seems to me that the process adopted by the Claimant was fundamentally flawed. There must be specificity in each separate allegation, as to time, place and circumstance and the requisite proof going to those issues.

22 Whilst recognising that this Claim is a civil proceeding to be determined on the balance of probabilities, the particularisation that is required in this and other like matters is similar to that required in a criminal proceeding. For example, in a criminal case, it is insufficient to allege that an accused had, over a period of time, stolen various items from various stores. What is required is the identification of the time, place and circumstance of each act of stealing. A similar approach should be adopted in matters of this type, given that a separate penalty may be imposed for each breach.

Has the Claimant Established a Breach, or Alternatively Breaches, of Clause 10.3?

23 It is clear to me that the evidence as it stands does not enable proof of multiple breaches of Clause 10.3 of the Agreement. The evidence does not permit the creation of a link between the individuals and schools identified in the ASC Annexures, and any particular District Office.

24 At its highest, the Court could conclude, based on information in the ASC Annexures, that there has been a failure to conduct inductions at a District Office. The evidence however, does not permit the identification of the particular District Office. In this instance, the failure to identify the District Offices will not defeat the Claim, because it is self-evident that the requirement to hold inductions at a District Office was not complied with. To that extent, the Claim is proven.

25 Even if the evidence did not permit such a finding, the Claim insofar as it relates to one breach, can be established on the admission made. The admission was made by the Respondent, following the decision of the WAIAC. In making the admission, the Respondent acknowledged that she had failed to comply with Clause 10.3 of the Agreement. The admission was not contingent. It simply recognised non-compliance with Clause 10.3. Having made the admission, the Respondent cannot now resile from it. There was nothing equivocal about the admission. At the very least, by that admission, the Respondent acknowledged that in at least one instance, Clause 10.3 of the Agreement had not been complied with.

26 The evidence does not however, permit the admission to extend beyond that.

27 The concession made establishes that the Respondent acknowledges that she failed to facilitate inductions at a District Office. Such is sufficient.

Consequential Orders

28 The Respondent contends that she has already been adequately punished for the failure to hold inductions (see *United Voice WA v Director General, Department of Education* [2012] WAIRC 00778), and that having regard to the totality principle in sentencing, she should not be further penalised. She suggests that a caution be issued.

29 The Claimant suggests that the failure to comply with Clause 10.3 of the Agreement has resulted in significant consequences to both United Voice WA and its members. The stance taken by the Respondent shows a lack of contrition, and it has put the Claimant to cost.

30 In determining this outstanding issue, I refer to my reasons for decision on penalties, delivered on 23 August 2012 (supra). I adopt what I said in that decision concerning the available remedies, and the sentencing principles applicable.

31 In addressing the issue as to whether in this instance it is appropriate to caution the Respondent, I acknowledge that the breach of Clause 10.3 of the Agreement was of particular significance to the Claimant because it took away the logistical benefits of inductions being conducted at a central place. That, as a matter of principle, loomed large for the Claimant. In that circumstance, the failure to comply with Clause 10.3 went beyond a mere technical breach or a breach of little significance which would have otherwise attracted a caution.

32 The failure was a significant departure from what was required and was something which led to consequences over and above that for which the Respondent has already been punished. In the circumstances, even taking into account the totality principle, a monetary penalty will be required to reflect the consequences of the breach. Totality, in appropriate circumstances, may be relevant to the quantum of the penalty to be imposed. Although relevantly considered in this matter it will not loom large in the outcome.

33 The maximum penalty available is $2,000.00. In imposing a penalty, the Court must recognise the singular breach in light of an otherwise unremarkable record. The fact that the Respondent did not make an early admission with respect to the breach significantly lessens the mitigating effect of the admission. Absent an early admission, the penalty that would be handed down for "offences" in circumstances of prior good record would be in the region of 25 per cent of the maximum penalty. I see no reason why this matter should be treated differently. The imposition of a penalty of $500.00 is appropriate and will not, in the context of the penalties previously imposed, offend the totality principle in sentencing.

34 I order that the Respondent be penalised $500.00. For the reasons previously expressed in my decision delivered on 23 August 2012 (supra), I order that the penalty be paid to the Claimant.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2014 WAIRC 01133

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTIAN APEDAILE
	APPLICANT
	-v-
	INDIAN OCEAN HOTEL BOVEE PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 14 OCTOBER 2014
FILE NO/S	B 41 OF 2014
CITATION NO.	2014 WAIRC 01133

Result Name of respondent amended

Order

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

WHEREAS at the hearing on the 10th day of October 2014 the respondent sought to amend the name of the respondent to "A.H Grove and J.W Grove and W Grove trading as Indian Ocean Hotel"; and

WHEREAS the applicant agreed to the name of the respondent being amended;

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

THAT the name of the respondent in the application be amended to "A.H Grove and J.W Grove and W Grove trading as Indian Ocean Hotel".

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

2014 WAIRC 01234

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTIAN APEDAILE
	APPLICANT
	-v-
	A.H GROVE AND J.W GROVE AND W GROVE TRADING AS INDIAN OCEAN HOTEL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 31 OCTOBER 2014
FILE NO/S	B 41 OF 2014
CITATION NO.	2014 WAIRC 01234

Result	Application dismissed
Representation	
Applicant	Mr C Apedaile on his own behalf
Respondent	Mr R Ballucci as agent

Order

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

WHEREAS on the 11th day of April 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the applicant sought time to consider his position; and

WHEREAS the matter was set down for a hearing of the issues of jurisdiction and discovery on the 10th day of October 2014; and

WHEREAS the hearing was adjourned into a conference where the parties reached an agreement in principle in respect of the application; and

WHEREAS on the 31st day of October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01082

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PENELOPE ARCHER
	APPLICANT
	-v-
	STARICK SERVICES INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 1 OCTOBER 2014
FILE NO/S	U 136 OF 2013
CITATION NO.	2014 WAIRC 01082

Result	Application discontinued by leave
Representation	
Applicant	Ms P Archer
Respondent	Mr D Jones as agent

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.

2014 WAIRC 01250

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR GERALD ROSS AVERY
	APPLICANT
	-v-
	MR GEORGE HEED + PARTNER ADELINE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 10 NOVEMBER 2014
FILE NO/S	B 77 OF 2014
CITATION NO.	2014 WAIRC 01250

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS this matter was listed for conference 24 July2014;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties;

AND WHEREAS this matter was listed for hearing on 5 November 2014 for the applicant to show cause why the application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT this application be, and is hereby, dismissed.

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

2014 WAIRC 01249

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR GERALD ROSS AVERY
	APPLICANT
	-v-
	MR GEORGE HEED + PARTNER ADELINE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 10 NOVEMBER 2014
FILE NO/S	U 77 OF 2014
CITATION NO.	2014 WAIRC 01249

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS this matter was listed for conference 24 July2014;

AND WHEREAS at the conclusion of the conference no agreement was reached between the parties;

AND WHEREAS this matter was listed for hearing on 5 November 2014 for the applicant to show cause why the application should not be dismissed;

AND WHEREAS the applicant failed to attend the hearing;

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

THAT this application be, and is hereby, dismissed.

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

2014 WAIRC 01176

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	HAZEL ELIZABETH BALL
	APPLICANT
	-v-
	WAGIN FRAIL AGED HOME
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 21 OCTOBER 2014
FILE NO/S	U 143 OF 2014
CITATION NO.	2014 WAIRC 01176

Result	Application dismissed
Representation	
Applicant	Mr R Grayden of counsel
Respondent	Mr B Jackson of counsel

Order

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

WHEREAS on the 1st day of September 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 13th day of October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01230

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
PARTIES	DARREN BOMFORD
	APPLICANT
	-v-
	M. G BURGES & S. L BURGES AND THE TRUSTEE FOR THE COMMODINE TRUST
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 30 OCTOBER 2014
FILE NO/S	U 204 OF 2013
CITATION NO.	2014 WAIRC 01230

Result	Discontinued
Representation	
Applicant	Ms E Douglas (as agent)
Respondent	Ms J Corkhill (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 5 February 2014 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the applicant considered an offer to settle the matter.

The Commission was advised on 12 February 2014 that the parties had reached an in principle agreement.

On 28 October 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01132

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REY CAGAMPANG
	APPLICANT
	-v-
	CAMELOT INVESTMENTS (WA) PTY LTD (IN LIQUIDATION) ACN: 095 069 775 FORMERLY TRADING AS "THE PIED PIPER"
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 13 OCTOBER 2014
FILE NO/S	B 146 OF 2013
CITATION NO.	2014 WAIRC 01132

Result	Application dismissed for want of prosecution

Order

WHEREAS the Commission gave reasons for decision in this application on 30 April 2014 ([2014] WAIRC 00356; (2014) 94 WAIG 598);

AND WHEREAS this application was adjourned until 1 October 2014 for Mr Cagampang to provide proof to the Commission that he has taken steps to seek the leave of the Federal Court of Australia or the Supreme Court of WA to allow this application to proceed;

AND WHEREAS Mr Cagampang has not made contact with the Commission;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) 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.

2014 WAIRC 01239

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES P. DAVIDSON
	APPLICANT
	-v-
	GENERAL MANAGER (MR LOUIE HANCOCK) BCL GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 NOVEMBER 2014
FILE NO/S	B 121 OF 2014
CITATION NO.	2014 WAIRC 01239

Result	Application discontinued
Representation	
Applicant	Mr J P Davidson
Respondent	Mr L Hancock

Order

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

AND WHEREAS on 11 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 29 October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 01238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES P. DAVIDSON
	APPLICANT
	-v-
	GENERAL MANAGER (MR LOUIE HANCOCK) BCL GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 NOVEMBER 2014
FILE NO/S	U 121 OF 2014
CITATION NO.	2014 WAIRC 01238

Result	Application discontinued
Representation	
Applicant	Mr J P Davidson
Respondent	Mr L Hancock

Order

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

AND WHEREAS on 11 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 29 October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01027

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01027
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 11 JULY 2014, WEDNESDAY, 3 SEPTEMBER 2014
DELIVERED	**:**	THURSDAY, 18 SEPTEMBER 2014
FILE NO.	**:**	U 88 OF 2014, B 89 OF 2014
BETWEEN	**:**	MARCELA DEL ROSARIO PAEZ
		Applicant
		AND
		BRIGHT SPARK EARLY LEARNING CENTRE
		Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment – Contractual benefits claim – Unfair dismissal application filed outside the 28 day time limit – Failure to pay filing fee – Show cause for want of prosecution – Application for an extension of time – Constitutional corporation – Enforcement of a modern award – Commission's jurisdiction excluded – Not unfair to not accept claim out of time – Applications dismissed – Orders made
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 29(1)(b)(i), 29(1)(b)(ii), 32 *Fair Work Act 2009* (Cth) s 12
Result	**:**	Dismissed for want of jurisdiction
Representation:		
Applicant	**:**	Mr V A Rodriguez as agent
Respondent	**:**	Ms D Parbat

Reasons for Decision

1 By these two applications Ms Marcela Paez claims that she was unfairly dismissed by her employer Bright Spark Early Learning Centre on or about 14 March 2014. Furthermore, Ms Paez claims that she was denied contractual entitlements by way of notice or pay in lieu thereof, which she was not provided on termination of her employment.

2 Regrettably these matters have a troubled history. Both applications were lodged on 28 April 2014. The unfair dismissal claim was also lodged outside of the 28 day time limit required by the Act for such proceedings. At the time of filing the applications, nor within seven days after, was the filing fee payable under the Regulations paid. Despite repeated requests from the Registry of the Commission, no response was received from Ms Paez.

3 Accordingly, on 11 July 2014, the applications were listed for show cause as to why they should not be dismissed. At that hearing, Ms Paez's husband Mr Rodriguez informed the Commission that the failure to respond to the repeated requests by the Registry to pay the filing fee was his error. He undertook to ensure that either the filing fee or an application to waive it would be made by 15 July 2014. An application for a waiver of the fee was made and the application was granted by the Registrar.

4 On 30 July 2014 the parties were notified that on 3 September 2014 the Commission would hear Ms Paez's application for an extension of time. Additionally, on the same day, Ms Paez's contractual benefits claim would be listed for a conciliation conference under s 32 of the Act.

5 At the hearing of the extension of time application, the respondent appeared for the first time. Whilst the respondent is identified as the "Bright Spark Early Learning Centre" from the submissions of respondent, and material before the Commission, it became apparent to the Commission that the applicant may have been employed by a corporation, Ashani Holdings Pty Ltd. Furthermore, it also became apparent that Ms Paez's contractual benefits claim was in reality, seeking no more than the enforcement of entitlements under the relevant modern award, made under the Fair Work Act 2009 (Cth). Therefore, neither application appeared to fall within the Commission's jurisdiction.

6 The Commission directed Bright Spark to file and serve a declaration setting out the proper identity of the employer of Ms Paez which it has done. It is plain that Ms Paez was employed by a constitutional corporation and therefore this Commission has no jurisdiction to hear and determine her unfair dismissal claim. Given that state of affairs, it could never be

unfair to refuse an extension of time, in circumstances where the claim has no prospects of success because the Commission has no jurisdiction to hear and determine a claim. The application must be dismissed.

7 In so far as the contractual benefits claim is concerned, it too is clear that the only benefit claimed following Ms Paez's one day of employment, was notice under the relevant modern award. There is no suggestion that the claim relates to an amount in excess of the relevant award entitlement. That is a matter which must be sought to be recovered in either the federal courts or an eligible State or Territory court, as defined under s 12 of the FW Act.

8 For the foregoing brief reasons both applications are dismissed for want of jurisdiction.

2014 WAIRC 01029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCELA DEL ROSARIO PAEZ
	APPLICANT
	-v-
	BRIGHT SPARK EARLY LEARNING CENTRE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 18 SEPTEMBER 2014
FILE NO/S	B 89 OF 2014
CITATION NO.	2014 WAIRC 01029

Result	Order issued
Representation	
Applicant	Mr V A Rodriguez as agent
Respondent	Ms D Parbat

Order

HAVING heard Mr V A Rodriguez as agent on behalf of the applicant and Ms D Parbat on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2014 WAIRC 01028

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCELA DEL ROSARIO PAEZ
	APPLICANT
	-v-
	BRIGHT SPARK EARLY LEARNING CENTRE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 18 SEPTEMBER 2014
FILE NO/S	U 88 OF 2014
CITATION NO.	2014 WAIRC 01028

Result	Order issued
Representation	
Applicant	Mr V A Rodriguez as agent
Respondent	Ms D Parbat

Order

HAVING heard Mr V A Rodriguez as agent on behalf of the applicant and Ms D Parbat on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2014 WAIRC 01144

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS JENNIFER FAGERSTROM
	APPLICANT
	-v-
	GREENWOOD PRIMARY SCHOOL
	PARENTS & CITIZENS ASSOCIATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 16 OCTOBER 2014
FILE NO/S	U 162 OF 2014
CITATION NO.	2014 WAIRC 01144

Result	Application discontinued
Representation	
Applicant	Ms J Sweeting
Respondent	Mr K Trainer (as agent)

Order

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

AND WHEREAS on 4 September 2014 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS on 14 October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01140

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEILA GAITSKELL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 16 OCTOBER 2014
FILE NO/S	U 111 OF 2013
CITATION NO.	2014 WAIRC 01140

Result	Application discontinued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Ms R Hartley (of counsel)

Order

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

AND WHEREAS on 19 August 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS the application was listed for a directions hearing on 20 January 2014;

AND WHEREAS on 20 March 2014 an order issued setting the application down for hearing on 12 – 15 May 2014;

AND WHEREAS on 28 April 2014 the parties advised the Commission they had reached an in-principle agreement;

AND WHEREAS on 7 October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARED GILBERT
	APPLICANT
	-v-
	GMT (GROVES MANUFACTURING AND TOOLING)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 14 OCTOBER 2014
FILE NO/S	U 175 OF 2014
CITATION NO.	2014 WAIRC 01136

Result	Application discontinued
Representation	
Applicant	Mr J Gilbert
Respondent	Mr S Groves

Order

HAVING heard Mr J Gilbert on his own behalf and Mr S Groves on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2014 WAIRC 01135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHAEL HAYWARD-SMITH
	APPLICANT
	-v-
	VANCAL PTY LTD T/AS GMT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 14 OCTOBER 2014
FILE NO/S	U 174 OF 2014
CITATION NO.	2014 WAIRC 01135

Result	Application discontinued
Representation	
Applicant	Mr M Hayward-Smith
Respondent	Mr S Groves

Order

HAVING heard Mr M Hayward-Smith on his own behalf and Mr S Groves on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2014 WAIRC 00476

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 12 JUNE 2014
FILE NO/S	B 48 OF 2014
CITATION NO.	2014 WAIRC 00476

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms K Walawski of counsel

Order

HAVING heard the applicant on his own behalf and Ms K Walawski of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The respondent be granted leave for its witness to appear by video link subject to the venue being approved by the Commission.

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

2014 WAIRC 00475

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 12 JUNE 2014
FILE NO/S	U 48 OF 2014
CITATION NO.	2014 WAIRC 00475

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms K Walawski of counsel

Order

HAVING heard the applicant on his own behalf and Ms K Walawski of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

The respondent be granted leave for its witness to appear by video link subject to the venue being approved by the Commission.

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

2014 WAIRC 00483

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 13 JUNE 2014
FILE NO/S	U 48 OF 2014, B 48 OF 2014
CITATION NO.	2014 WAIRC 00483

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr G McCorry as agent

Order

HAVING heard the applicant on his own behalf and Mr G McCorry as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT applications U 48 and B 48 of 2014 be and are hereby joined and be heard and determined together.

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

2014 WAIRC 00521

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 20 JUNE 2014
FILE NO/S	B 48 OF 2014, U 48 OF 2014
CITATION NO.	2014 WAIRC 00521

Result	Adjourned
Representation	
Applicant	In person
Respondent	Mr G McCorry as agent

Order

HAVING heard the applicant on his own behalf and Mr G McCorry as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the matter be adjourned to a date to be fixed.

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

2014 WAIRC 01119

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01119
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 13 JUNE 2014, FRIDAY, 1 AUGUST 2014
DELIVERED	**:**	WEDNESDAY, 8 OCTOBER 2014
FILE NO.	**:**	U 48 OF 2014, B 48 OF 2014
BETWEEN	**:**	COLIN HOLLY
		Applicant
		AND
		HARVEY COURIER SERVICE
		Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment – Harsh, oppressive and unfair dismissal – Contractual benefits claim – Conduct and behaviour in the workplace – Insulting language and offensive behaviour – Challenging the authority of a supervisor – Claim for a bonus – Casual employment – Principles applied – Serious misconduct – Essential condition of the contract of service – Employed on a regular and systematic basis – Dismissal for misconduct warranted – Contract not varied – No entitlement to a bonus – Applications dismissed – Orders made
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 29(1)(b)(i), 29(1)(b)(ii)
Result	**:**	Applications dismissed
Representation:		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr G McCorry as agent
Solicitors:		
Respondent	**:**	IRDI Legal

Case(s) referred to in reasons:

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

Byrnes v Treloar (1997) 77 IR 332

Clouston & Co Limited v Corry [1906] AC 122

Concut Pty Ltd v Worrell (2000) 75 ALJR 312

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association of Australia (1973) 15 AILR 323

McCasker v Darling Downs Co-operative Bacon Association Ltd (1988) 25 IR 107

Melrose Farm Pty Ltd t/as Milesaway Tours v Milward (2008) 88 WAIG 1751

North v Television Corporation Ltd (1976) 11 ALR 599

Rankin v Marine Power International Pty Ltd (2001) 107 IR 117

Ryde-Eastwood Leagues Club Limited v Taylor (1994) 56 IR 385

Swan Yacht Club (Inc) v Bramwell (1998) 78 WAIG 579

Case(s) also cited:

Blyth Chemicals Limited v Bushnell (1933) 49 CLR 66

Re Railway Appeal Board; Ex parte Western Australian Government Railways Commission (1999) 21 WAR 1

The Jupiter General Insurance Company Limited v Shroff [1937] UKPC 51

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia (1985) 65 WAIG 385

Wilson v Racher [1974] ICR 428

Reasons for Decision

1 Mr Holly was an employee of Harvey Courier Service for about three years. He worked as a driver of a courier truck and was employed on an hourly rate of pay, on a casual basis. His work was reasonably regular and continuous for about 24-26 hours per week over that period of time. Harvey Courier is a small business which operates a courier service based at Harvey in the south west of the State. The business initially operated in the Bunbury region, but has expanded to the Perth region also. The business initially operated two trucks, one of which was driven by a partner in the business, Mr Italiano, and the other was driven by Mr Holly. A second driver was employed as the business expanded. Mr Italiano's wife, Mrs Italiano, handles the administration side of the business.

Dismissal

2 As a consequence of the conduct of Mr Holly up to and including December 2013, Harvey Courier dismissed him on 6 February 2014. Mr Holly now complains that his dismissal was unfair. He also claims that he was denied a contractual benefit in the sum of $738.15 which he maintains was an agreed bonus payment of 60c per hour. Mr Holly contended that Harvey Courier agreed to pay him the bonus in January 2013, but failed to pay it to him.

3 On or about 11 December 2013 at Harvey Courier's office, Mr Holly entered the premises to speak to Mrs Italiano. The day prior, Mr Holly had requested Mrs Italiano to verify some income information which Mr Holly had to submit to a government department, in connection with a residential tenancy matter. At the time, Mrs Italiano was very busy with work commitments and she told Mr Holly that she would attend to it as soon as she could. When in the office on 11 December Mr Holly again asked Mrs Italiano if she had completed the requested information from the previous day.

4 At this particular time, Mrs Italiano testified that she was dealing with an urgent problem that had arisen with one of the trucks which had suffered a broken windscreen and was required to be offloaded and arrangements made for repairs. This was incidentally the vehicle that Mr Holly was driving on this day. Mrs Italiano said she told Mr Holly when he asked whether the information had been checked as requested, that she had still been too busy to deal with it but would do so as soon as she could. At this point, Mrs Italiano said that Mr Holly's demeanour changed and he became very angry. As to this incident, in her examination in chief, Mrs Italiano said at T90:

> And what happened after this?---Okay, so when truck 3 arrived and Kevin had arrived and the other drivers with their vehicles had arrived we proceeded to offload the freight from Mr Holly. Again, it's - I'd made sure that I had the corresponding consignment notes to every bit of freight that was coming off, so everyone was hands on deck. Once that seemed to be under control Kevin left. I then continued on with some of the drivers that were there cos they obviously had a time limit to keep to. I then proceeded into our office to do some other - get some other paperwork. Mr Holly asked if I had completed or filled in a form that he'd asked me to the day before to which I replied, "No, I had not had time to do it this morning". Mr Holly then started really just having a go at me, verbally abusing me for not doing the job that he wanted done right there and then, you know. And I went and sat down at my desk to try and put some distance between him and I. I was also aware that there were other drivers and my two children were also out there at the time, so I sort of tried to distance us from the other drivers obviously seeing Mr Holly was getting quite irate. Mr Holly then proceeded to pace up and down in front of my desk, calling me all sorts of names and insinuating that any three year-old could do this job, why am I S-h-i-t, stirring him. To which point I said, "I'm not doing that. You know, today I did not get a chance to do it this morning". I mean this was at 9 o'clock. I do apologise he did ring me at 9 o'clock to ask if I had

done the paperwork at which time I said I would endeavour to get it done today. But obviously from 9 o'clock until 1.30 I was preoccupied with trying to get windscreens organised, insurance companies organised and freight organised so, no, I did not have time to complete it that morning although I did say I'd endeavour to get it done by the end of the day. This was 1.30 in the afternoon. So he continued his barrage towards me really, just actually - - -

How did you feel at the time?---I felt very, very threatened, I really did, I was - in one way I was happy that there was somebody outside just in case. I was happy I was behind a desk with a bit of distance. I have never seen anybody act that way towards me before.

Just let me stop you there. Have you have any previous experience with people who are upset or angry?---Yes.

Can you tell the Commission what those were?---I was a volunteer ambulance officer for four years in Harvey and attended several drug overdoses and car accidents et cetera et cetera and they come naturally with sometimes very irate people. I have never had any - felt any way like I did that particular day. I've worked in the emergency department at nights at Bunbury Hospital on my own as a clerk.

Again, I've never had any feeling ever that I was actually going to be physically attacked as I did that day. Because if you start coming into my private space by pointing over a desk, then that starts to become very, very confronting.

5 Mrs Italiano said she was very upset by this incident and telephoned her husband Mr Italiano, to inform him of what had occurred. Mrs Italiano prepared a note of the incident the next day.

6 Mr Holly testified that he was frustrated with Mrs Italiano's attitude to what he regarded as a "two minute job" to check his income figures so the document involved could be sent to the government department, as he requested. It had to be sent to them by 11 December. Mr Holly accepted that when he was told by Mrs Italiano that she had still not attended to his request, that he got "very very angry" with her and told her that Mrs Italiano's response, that she was very very busy, was "just crap" and further told Mrs Italiano "Well, you bloody well get in there and do it": T17. Mr Holly accused Mrs Italiano of "shit-stirring" him. He admitted that he used some "choice words" towards Mrs Italiano: T17. He also accepted that he went and sat in a chair in the office to wait for Mrs Italiano to check the information he had given to her. He said he sat in the chair and whistled and accepted that he did this to annoy Mrs Italiano. At no stage did Mr Holly apologise for his behaviour and nor did he think he had to.

7 Also in the office area at this time was Mr Simms. Mr Simms is a driver employed by Harvey Courier and is a former police officer of some 31 years standing. Mr Simms was located in the shed area of the premises at the time. A door adjoins the shed area and the office, where both Mrs Italiano and Mr Holly were located. Also in the shed at this time, were the Italianos' two young sons. Mr Simms, in his evidence in chief, described what occurred in the following terms at T63:

And what happened?---Colin Holly came in, walked through the shed area, greeted me and then walked into the office.

And can you tell us what occurred or what you saw and observed - saw and heard?---As - as he walked into the office, his voice became raised. He started shouting at Catherine and swearing. He was pacing backwards and forwards in front of her desk and continuing to shout and swear.

And what did you do at this time?---I moved closer to the doorway so I could monitor the situation and - - -

Any particular reason for that?---Yes, I - I thought it might become violent so I positioned myself there so I could monitor it in case it did.

8 After the incident, on 15 December 2013, Mr Simms also prepared a note of what he saw and heard.

9 On the same day of the incident in the office, in the evening, Mr Italiano testified that he rang Mr Holly to tell him not to come into work the following day. He also told him that they would need to have a discussion with him in relation to the events in the office earlier that day. Mr Italiano agreed to pay Mr Holly for the day, although he would not be coming in. According to Mr Italiano, Mr Holly told him words to the effect "Well, I'm saying this as a mate but be very, very careful. You don't know who you're dealing with": T69. Mr Italiano regarded Mr Holly's comments as a threat. Mr Italiano made a note of this conversation. Mr Holly testified that he said this to Mr Italiano in the context of taking Harvey Courier to court if he was dismissed.

10 A range of other conduct and behaviours were referred to and relied on by Harvey Courier to support its decision to dismiss Mr Holly. These were set out in an undated letter to Mr Holly, which was given to him by Mrs Italiano on or about 26 January 2014. A meeting was arranged for 28 January 2014 to discuss these various issues. These issues were described as "Allegations and Areas of Concern" in the letter and were expressed in the following terms:

Allegations and Areas of Concern

1. Using of profanities and using language that is demonstratively abusive in and around in the office.
2. Use of foul language to denigrate colleagues in a particularly aggressive and demeaning way.
3. Structured your use of language so as to convey a threat.
4. Demonstrated a propensity to easily become angered and the use of aggressive profanities has been unsettling and unnerving to other employees of Harvey Courier.
5. Not adhering to speed limits as advised and in some cases signed when entering workplaces. This has resulted on one occasion a formal complaint being forwarded to Harvey Courier.

Please provide a written response no later than 12 noon Tuesday 28th January to each of the above allegations by:

a. Accepting the truth of the allegation;

b. Denying the truth of the allegation; or

c. Accepting the truth of the allegation and providing any relevant context that might excuse the conduct.

The above allegations and areas of concern are, on the face of things, serious enough to warrant the termination of your employment. However we will carefully consider your response to the allegations before making any decision regarding your employment.

11 These matters and others referred to in the letter of termination of employment to Mr Holly, dated 6 February 2014, such as repeated breaches of occupational health and safety legislation and Mr Holly's failure to report damage to Harvey Courier's property, were the subject of extensive evidence in these proceedings. However, in my view, except for the references to the conduct of Mr Holly on 11 December 2013, in his dealings with Mrs Italiano and Mr Italiano on the telephone later that evening, these other matters are not able to be relied on by Harvey Courier to justify the decision to dismiss Mr Holly. This is because, crucially, in a staff meeting on 9 December 2013, where Mr Holly suggested to the Italianos that their attitude towards him seemed to have changed, following a brief absence by Mr Holly on workers' compensation some time earlier, Mr Italiano assured Mr Holly that "We're happy with you. We're – and – you know, and you – and there's no problem. That's your – your perception": T73.

12 Mr Holly also said in his evidence that as to the other conduct complained of in the letters from Harvey Courier, other than speeding on the client's premises, none of it had been raised with him prior to the meeting on 28 January 2014. Having been informed by Mr Italiano at the meeting of 9 December 2013, that Harvey Courier had "no problems" with Mr Holly, and that Harvey Courier was "happy" with him, it is not open, and it would be industrially unfair in my view, to seek to now rely on these events prior to 9 December, to support Harvey Courier's grounds for dismissal of Mr Holly.

13 However, in the circumstances of this case, there is no necessity for any regard to be had to the other alleged conduct and behaviour of Mr Holly. That is because, in my view, the conduct and behaviour of Mr Holly on 11 December 2013, constituted gross misconduct warranting his summary dismissal. The conduct by Mr Holly towards both Mrs and Mr Italiano, demonstrated a complete disregard for an essential condition of his contract of service with his employer: *Clouston & Co Limited v Corry* [1906] AC 122 at 129. The relevant conduct needs to be sufficiently serious to warrant the employer dismissing the employee: *North v Television Corporation Ltd* (1976) 11 ALR 599 at 608-609. A single act of misconduct, if sufficiently serious, may warrant summary dismissal for misconduct: *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312. In the case of insulting or objectionable language, it may constitute grounds for dismissal, in particular where directed towards challenging the authority of a supervisor: *John Lysaght (Australia) Pty Ltd v Federated Ironworkers Association of Australia* (1973) 15 AILR 323; *Byrnes v Treloar* (1997) 77 IR 332.

14 In this case, it was not just a supervisor on the receiving end of abusive and threatening conduct by Mr Holly, but his employer. The conduct was plainly serious enough in my view, to warrant dismissal for misconduct. Whilst Mr Holly denied that he had a propensity to get angry quickly, I do not accept that evidence. From my observations of Mr Holly in the course of giving his evidence, such a propensity was demonstrated.

15 Whilst some time elapsed from the incident to the time of the dismissal, it is not the case in my view, that there was any waiver or condonation by Harvey Courier of Mr Holly's conduct: *McCasker v Darling Downs Co-operative Bacon Association Ltd* (1988) 25 IR 107; *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117. Mr Italiano told Mr Holly on the telephone on the evening of 11 December that the issue of his behaviour that day would require a meeting to discuss it. The evidence is that Harvey Courier then took legal advice on Mr Holly's conduct and behaviour. The Christmas break intervened and in January 2014, Harvey Courier gave Mr Holly a letter raising its concerns formally.

16 In this case, Mr Holly was engaged as a casual employee. However, he was employed over some three years on a regular and systematic basis. Such a category of employee may be dismissed and may be dismissed unfairly: *Swan Yacht Club (Inc) v Bramwell* (1998) 78 WAIG 579; *Ryde-Eastwood Leagues Club Limited v Taylor* (1994) 56 IR 385; *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* (2008) 88 WAIG 1751.

17 The dismissal of Mr Holly in this case was not in any sense unfair. In my view, it was entirely justified.

Bonus

18 The basis for Mr Holly's claim to a bonus of 60c per hour to be banked into a separate bank account on his behalf was less than clear, on all of the evidence. Mr Holly testified that he spoke to Mr Italiano in about January 2013 at the business' Wokalup depot. By that time he had been with Harvey Courier for about two years. As the employer seemed to be happy with his performance, Mr Holly asked Mr Italiano whether he could have an increase in his rate by 60c per hour, with the money put aside in a separate bank account to be used at the end of the year to contribute to a Christmas holiday. Mr Holly testified that Mr Italiano indicated that "I'm sure we can look after that somehow": T10. Mr Holly accepted however that Mr Italiano did not definitely say "yes": T10.

19 Mr Italiano testified that Mr Holly did raise the issue of a pay increase with him. He said that he could not make a decision about these matters by himself as he needed to discuss such matters with his wife, as his business partner. Mr Italiano said that he asked Mr Holly to put the request in writing. Mr Holly never did. The next Mr Italiano heard of the issue was when Mr Holly raised it in the staff meeting on 9 December 2013. Mrs Italiano testified that her husband told her of Mr Holly's request and that he was to put it in writing, but no such written request was received.

20 The onus is on Mr Holly to establish his claim for a denied contractual benefit. The required elements of such a claim were set out by the Full Bench of the Commission in *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704. They are that the applicant be an employee; that the matter be an industrial matter; that the subject of the claim be a benefit under the contract of employment; that the claimant must be entitled to the benefit; the subject contract must be a contract of service; that the benefit must not arise under an award or order of the Commission; and the benefit must have been denied by the employer (see too: *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG 1867).

21 It is necessary in this case, for Mr Holly to establish that his contract of employment was varied in about January 2013, to increase his rate of pay in the terms alleged by him. On the basis of the evidence, I am not persuaded that Mr Holly has done so. While it was common ground that the issue of a 60c pay increase was discussed between Mr Holly and Mr Italiano at that time, there was no evidence before the Commission to establish that there was an agreement to do so. Mr Holly conceded that Mr Italiano did not "say yes" to his proposal to increase his rate of pay. At its highest, the evidence suggests that Harvey Courier would look favourably at the suggestion. I accept Mr Italiano's evidence that he did request Mr Holly to put the request in writing, which was confirmed by Mrs Italiano. I also accept the evidence of both Mr and Mrs Italiano, that as partners in the business, any such agreement would need to be endorsed by both of them. The request from Mr Holly was never put in writing by him. It was not pursued by him during the course of 2013, until the staff meeting in December of that year. There was some suggestion by Mr Holly that payslips he received from Harvey Courier in some way supported his claim, but I am not persuaded that that is so. Mr Holly must establish that he had a contractual entitlement. He has not done so. This claim must fail.

22 Accordingly, the applications must be dismissed.

2014 WAIRC 01120

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 8 OCTOBER 2014
FILE NO/S	U 48 OF 2014
CITATION NO.	2014 WAIRC 01120

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr G McCorry as agent

Order

HAVING heard the applicant on his own behalf and Mr G McCorry as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2014 WAIRC 01121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HOLLY
	APPLICANT
	-v-
	HARVEY COURIER SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 8 OCTOBER 2014
FILE NO/S	B 48 OF 2014
CITATION NO.	2014 WAIRC 01121

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr G McCorry as agent

Order

HAVING heard the applicant on his own behalf and Mr G McCorry as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2014 WAIRC 01126

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FARZANAH HOOLASH
	APPLICANT
	-v-
	JASON ALLEGRETTA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 9 OCTOBER 2014
FILE NO/S	U 163 OF 2014
CITATION NO.	2014 WAIRC 01126

Result	Application dismissed

Order

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

WHEREAS by a Notice of Hearing dated the 17th day of September 2014, the Commission advised that a hearing would be convened on the 9th day of October 2014 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 9th day of October 2014 there was no appearance for or by the applicant; and

WHEREAS the Commission took account of the history of the application and other matters and decided to dismiss the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KSENIIA KAZAKOVA
	APPLICANT
	-v-
	SHANE O'RILEY DIRECTOR / HEAD DESIGNER VISIONARY VANGUARD PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 5 NOVEMBER 2014
FILE NO/S	B 201 OF 2014
CITATION NO.	2014 WAIRC 01245

Result	Name of respondent corrected
Representation	
Applicant	Ms T Emmanuel, of counsel and Mr M Barnes
Respondent	Mr S O'Riley

Order

WHEREAS the parties to this matter agree that the correct name of the respondent is "Visionary Vanguard Pty Ltd ACN 157946560" and the application should be corrected accordingly; and

HAVING HEARD Ms T Emmanuel, of counsel and Mr M Barnes, on behalf of the applicant and Mr S O'Riley, on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby order -

THAT the name of the respondent "Shane O'Riley Director / Head Designer Visionary Vanguard Pty Ltd" be deleted and "Visionary Vanguard Pty Ltd ACN 157946560" be inserted in lieu thereof.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2014 WAIRC 01243

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KSENIIA KAZAKOVA
	APPLICANT
	-v-
	VISIONARY VANGUARD PTY LTD ACN 157946560
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 5 NOVEMBER 2014
FILE NO/S	B 201 OF 2014
CITATION NO.	2014 WAIRC 01243

Result	Order issued
Representation	
Applicant	Ms T Emmanuel, of counsel and Mr M Barnes
Respondent	Mr S O'Riley

Order

WHEREAS the Commission has before it a claim by Ms K Kazakova that she has not been allowed by her former employer Visionary Vanguard Pty Ltd a benefit to which she is entitled under her contract of employment;

AND WHEREAS Mr S. O'Riley, a director of Visionary Vanguard Pty Ltd, agrees that the company owes Ms Kazakova $25,308.18 net of tax for salary earned and not paid; $4,593.17 for superannuation; and $6,358.00 being taxation on the amount paid and owed;

AND WHEREAS the Commission convened a conference at which Ms K Kazakova and Visionary Vanguard Pty Ltd reached an agreement in settlement of the claim and consent to an order issuing in the terms of that agreement;

NOW THEREFORE I, Chief Commissioner, having heard Ms T Emmanuel, of counsel, and Mr M Barnes on behalf of the applicant and Mr S O'Riley for Visionary Vanguard Pty Ltd, and by consent, hereby make the following orders:

1. THAT on or before Friday 14 November 2014 Visionary Vanguard Pty Ltd shall pay Ms K Kazakova the sum of $25,308.18 net of tax into her nominated bank account.
2. THAT on or before Friday 14 November 2014 Visionary Vanguard Pty Ltd shall pay $4,593.17 into Ms K Kazakova's superannuation account.
3. THAT as soon as practicable after Friday 14 November 2014 (and in any event by 30 June 2015) Visionary Vanguard Pty Ltd shall pay $6,358.00 to the Australian Taxation Office in consideration of the salary paid to Ms K Kazakova.

4. THAT on or before Friday 14 November 2014 Visionary Vanguard Pty Ltd shall provide a statement of service to Ms K Kazakova.

5. THAT Ms K Kazakova undertakes that when the payments in orders 1 and 2 above have been made she will withdraw proceeding C2014/1750 in the Fair Work Commission and accept the payments and statement of service in full and final settlement of that proceeding and this claim.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2014 WAIRC 01195

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NANNETTE LATHAM
	APPLICANT
	-v-
	NEERIGEN BROOK PRIMARY SCHOOL P & C
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 23 OCTOBER 2014
FILE NO/S	U 72 OF 2014
CITATION NO.	2014 WAIRC 01195

Result	Application discontinued
Representation	
Applicant	Ms N Latham
Respondent	Ms J Smith

Order

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

AND WHEREAS on 18 June 2014 the Commission convened a conference for the purpose of conciliating between the parties;

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

AND WHEREAS this matter was discontinued by the Commissioner;

AND WHEREAS on 20 October 2014 the signed Notice of Discontinuance in respect of the application was filed;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01102

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01102
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	SUBMISSIONS IN WRITING
DELIVERED	**:**	FRIDAY, 3 OCTOBER 2014
FILE NO.	**:**	U 37 OF 2014, B 37 OF 2014
BETWEEN	**:**	KYLIE NICOLE LAWSEN
		Applicant
		AND
		WINUN NGARI ABORIGINAL CORPORATION
		Respondent

CatchWords	:	Industrial Law - Whether respondent is a trading corporation - application of 'activities test' - Relevant time considered - Importance of income in relation to employment period – lack of veracity of evidence at first instance - denied contractual benefits claim award employed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), *Commonwealth Constitution* s 51(xx), *Fair Work Act 2009* (Cth) s 14(1)(a), s 26, s 29(1)(b)(ii)
Legislation	:	*Industrial Relations Act 1979* (WA)
Result	:	s 29(1)(b)(i) Jurisdiction Found
Result	:	s 29(1)(b)(ii) Application dismissed
Representation:		
Applicant	:	Ms K N Lawson
Respondent	:	Mr G Power and Ms S Murphy

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No. 2] [2008] WASCA 254; (2009) 89 WAIG 243

Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1

Fencott v Muller (1983) 152 CLR 570

Health Services Union of Western Australia (Union of Workers) v Director General of Health in the right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service (2008) 88 WAIG 543

Matthews v Cool or Cosy Pty Ltd & Another (2004) (84 WAIG 2152)

New South Wales v Commonwealth (2006) 229 CLR 1

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

Saldanha v Fujitsu Australia Pty Ltd [2008] WAIRC 01732

Springdale Comfort trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

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

Visser v Eral Pty Ltd (2007) WAIRC 01148

Reasons for Decision

1 Ms Kylie Lawsen (the applicant) alleges she was unfairly dismissed by the Winun Ngari Aboriginal Corporation (the respondent) and filed claims under s 29(1)(b)(i) and s 29 (1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the Act) in the Western Australian Industrial Relations Commission (the Commission) on 10 February 2014 seeking compensation and a denial of contractual benefits.

2 The respondent opposed the claim and challenged the jurisdiction of the Commission to hear and determine the unfair termination and denied contractual benefits matters. The respondent submits the Commission does not have jurisdiction to hear either application and requests each application be dismissed.

3 Consistent with the principles reflected by their Honours in ***Springdale Comfort trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1986) 67 WAIG 325 once a question of jurisdiction has been raised, the Commission must hear and determine that question.

4 The Commission sought written submissions from the applicant and the respondent on the issue with respect to each application. The Commission received written submissions from Ms Lawsen on 25 July 2014 and from the respondent on 13 June 2014 setting out their views with respect to jurisdiction. The Commission then sought supplementary submissions from the respondent and the applicant:

> Whilst there were a series of assertions made by the respondent in its submissions there appears to be no proof provided. Accordingly, the Commission is providing the respondent with a further opportunity to submit supplementary submissions by close of business on Wednesday, 13 August 2014 addressing the question of legal personality, the nature of the activities carried out by the respondent at the relevant time and any other matters it considers relevant.
>
> …
>
> The respondent is to provide a copy of its submissions to the applicant who will then have until close of business on Wednesday 20 August 2014 to comment on anything she considers relevant.
>
> (extract from Commission correspondence 30 July 2014)

5 The Commission sought and received supplementary submissions from the respondent on 13 August 2014 and from the applicant on 20 August 2014.

Respondent

6 The respondent submits that the organisation is an incorporated entity for the purposes of s 16.5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth):

> An ***Aboriginal and Torres Strait Islander corporation*** is a corporation registered under this Act

7 The respondent submits the objectives of the respondent corporation to be:

a. provide accounting/bookkeeping and other community services for its members;

b. support the social development of its members in all ways;

c. help to bring about the self–support of its members by the development of economic projects and industries;

d. support education, job training, health services, work and housing for its members;

e. help and encourage its members to manage their affairs upon their own lands;

f. help and encourage its members to keep and renew their traditional culture;

g. help build trust and friendship between its members and other people;

h. participate with other Aboriginal Corporations in projects for their mutual benefit; and

i. receive and spend grants of money from the Government of the Commonwealth or of the State or from other sources.

([3] respondent's submissions 13 June 2014)

8 The respondent did not provide a copy of the organisation's rules with its submission. The respondent submitted a commercial division was commenced within the organisation for the provision of services on a fee for service basis for incorporation members. The assertion was:

> This Commercial division had commenced at the time of termination of the Applicant.

([4] respondent's submissions 13 June 2014)

The applicant was terminated by the respondent on 16 January 2014. No actual date for commencement of the commercial division was provided.

9 The commercial division it was asserted by the respondent included:

the provision of accounting services;

owner/operator of a roadhouse petrol station and store;

management of a roadhouse petrol station and store;

provision of municipal services; and

labour and equipment hire.

([5] respondent's submissions 13 June 2014)

10 A statutory declaration from Ms Susan Murphy the CEO of the respondent dated 13 August 2014 was provided in the supplementary submission. The breakdown of revenue received by the respondent in the 2013/2014 financial year included:

Government funding	$8,026,419.66	60.25%
Frilled Enterprises Pty Ltd	$1,922,550.23	14.43%
Imintji Store	$1,315,376.47	9.87%
Other income	$2,057,049.19	15.44%

11 The statutory declaration attached profit and loss statements for the 2013/2014 financial year for:

Winun Ngari Aboriginal Corporation;

Imintji Store; and

Frilled Enterprises Pty Ltd.

Each of the three profit and loss statements had DRAFT stamped across the top suggesting these may not be the final documents. The respondent asserts that other than government funding for the 2013/2014 financial year the respondent received $5,294,975.89 in income, a percentage of 39.75% of total income received.

12 The respondent submits Imintji Store is entirely a trading activity. Its revenue is entirely from sales and that Frilled Enterprises Pty Ltd provides a range of services including labour hire, motor vehicle hire, equipment hire, administration and bookkeeping services, gardening and landscaping services and commercial and residential construction.

13 The respondent relied on the authority of the Industrial Appeal Court Decision ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence*** [No. 2] [2008] WASCA 254; (2009) 89 WAIG 243 where it was said at [94]:

> The 'activities test' raises two issues. The first is whether an activity of a corporation is to be characterised as trading or non-trading. The second concerns the level of trading activity that is necessary for the corporation to be characterised as a trading corporation.

14 With respect to the activities of the Imintji Store, Frilled Enterprises Pty Ltd and the other income of Winun Ngari Aboriginal Corporation the respondent submitted these can be characterised as trading. These activities represent 39.75% of the total income of the respondent. It is therefore open for the Commission to find that the respondent's trading activities are substantial.

Denied Contractual Benefits

15 With respect to the claim for denied contractual benefits the respondent submits the applicant's claim forms part of termination relief, is for potential payments relating to the operation of a contract and is therefore outside the jurisdiction of the Commission.

16 The respondent submits:

a. Applicant was on a contract of employment;

b. The works were accounts payable and receivable works;

c. These works were regulated at minimum levels by the Modern Awards of the *Fair Work Act 2009* (Cth), being the *Clerks – Private Sector Award 2010* and/or *the Labour Market Assistance Industry 2010.*

d. The particulars of the claim is for prospective payments arising from the operation of the contract until 30 June 2014.

([13] respondent's submissions 13 June 2014)

17 The respondent therefore submits the application ought to be dismissed through lack of jurisdiction.

Applicant's Submissions

18 The applicant submitted a copy of the respondent's consolidated audited financial report for the financial year ended June 2013 noting a comment from the independent audit to the board of the respondent:

> **Inherent Uncertainty Regarding Going Concern**
>
> Without qualification to the opinion expressed above, attention is drawn to the following matter. The financial report is prepared on the basis of the Corporation being a going concern. This is dependent upon continued funding from government agencies.
>
> (extract from independent audit report 2012/2013 to Winun Ngari Board)

19 No reference is given in the audited report to trading activities as contributing to the operating costs of the respondent. The applicant submits that fees for service as provided by the respondent were minimal and not central to the overall operations. The commercial division referred to by the respondent did not exist within the time of the applicant's employment with the respondent.

20 A position entitled enterprise development officer was in place prior to the time the applicant commenced with the respondent, a position intended to assist the respondent's members and indigenous communities of the respondent to manage their own enterprises with support in the areas of sustainable business practices, training and development and help in matters of stock and finances. The community owned enterprises included the Mount Barnett Roadhouse owned by Mount Barnett Station Pty Ltd, Kupingarri Community and Imintji Store owned Imintji Aboriginal Corporation.

21 The respondent does not employ a qualified accountant and any services provided of a bookkeeping data entry nature were, in the view of the applicant minimal, with any income generated by fees for service. The only bookkeeping/management service fee charged was for the Mount Barnett Roadhouse, a fee of $2,200 per month, a fee that was offset against the debt accumulated by monies loaned to the store for stock and running costs. None of this income from management fees was offset against the overall operating costs of the respondent.

22 The respondent does not own the Imintji Store as declared in their submission. The history is that the store was originally established by the Imintji Aboriginal Corporation some years ago on Crown reserve 40571 and allocated under a management order held by the Aboriginal Lands Trust which was granted on lease. The store was established to service the members of remote communities and tourists travelling along the Gibb River Road in the Kimberley region. The store was unable to sustain the business and was subsequently taken over by other entities. In 2009 the respondent by way of management order took over the running of Imintji Store in conjunction with the Imintji Aboriginal Corporation, the respondent and Imintji each securing a loan to get the store up and running to a viable level. The Imintji Store is registered under a trust with its own ABN number (43 936 943 458) and bank account to distinguish its financial affairs from those of the respondent's principal activities. All income and outgoings by the store are kept on a separate database to those of the respondent's principal activities and an independent accountant is also engaged to attend to financial reports and lodgement of tax requirements for the store.

23 The breakdown of income and outgoings for the 2013/2014 financial year as supplied by the respondent in the view of the applicant is not adequately outlined for the purposes of determining whether or not the respondent can be deemed a trading organisation. No factual documentation for year-end financial statements have been provided as examples to determine the validity of the organisation. The percentages provided by the respondent are unverifiable and pertain only to a part of the financial year in which the applicant was employed. It was in the latter half of the 2013/2014 financial year that the respondent's trading enterprise development aspects became evident. Therefore those figures should be dismissed as they do not represent an accurate reflection of the term of employment of the applicant.

24 The applicant submits that the percentage of revenue the respondent receives from trading activities cannot be verified as pertaining to the term of the applicant's employment with the respondent. It may be the case that revenue received by the respondent is inclusive of the claims made.

25 Prior to being awarded Remote Jobs and Communities Program (RJCP) funding in mid to late 2013 the respondent's staff were advised that their employment contracts due for renewal on 1 June 2013 would only be renewed for a period of three months due to the uncertainty of the respondent's future if they were not successful in their bid for the RJCP funding agreement. When the agreement was finally awarded to the respondent it was only then that the staff could apply for available positions under the new scheme and have their contracts renewed to 30 June 2014.

26 As the extract provided by the respondent is a generalised summary for the purposes of an unrelated case the applicant emphasises that the activities of the respondent are what ought to be considered for the purposes of the applicant's employment between May 2012 and January 2014 (the term of her employment). Whilst it may be the objective of the CEO, Ms Murphy to transform the respondent into a self-supporting trading organisation it is in the applicant's view far from meeting those objectives in terms of s 51(xx) of the *Commonwealth of Australia Constitution Act* (Cth).

27 In relation to the applicants denied contractual benefits claim the contract sought was issued pursuant to the *Aboriginal Communities and Organisations Western Australian Interim Award 2011*. Nowhere in the contract does it make reference to the *Fair Work Act* (2009) nor the *Clerks Private Sector Award 2010* (Cth) nor the *Labour Market Assistance Industry Award 2010* (Cth). The applicant therefore is not a matter considered relevant to the *Fair Work Act 2009*. The applicant clarified there were two clearly defined applications lodged with the Commission that she was seeking a denial of a contractual entitlement. Whilst the information presented to the Commission has been combined, in the view of the applicant it does not diminish the inherent differences of each claim and the fact that the Commission will be required to rule upon each claim independent of each other. Several items of correspondence from Ms Murphy were enclosed dated 27 February 2014 outlining the background to the monetary challenges facing the respondent's organisation.

28 In the supplementary submission the applicant reiterated that the trading information provided by the respondent relating to the Imintji Store should not be considered by the Commission as it is not a principal activity of the respondent. Further the profit and loss statement for Frilled Enterprises Pty Ltd should, in the view of the applicant, be disregarded given there was on the general report submitted to The Office of the Registrar of Indigenous Corporations (ORIC) for the year ending 30 June 2013 no mention at all except to comment that they had a zero bank balance and in the view of the applicant the monies transferred from the respondent's operating account are inadmissible as relevant income.

29 In relation to equipment hire and materials the applicant was unaware of any income during her time with the respondent. Gardening and landscaping services were not operating until after the applicant's dismissal. Similarly with respect to commercial and residential construction the applicant had no knowledge of such a service and can only assume such was operational after the applicant's dismissal.

30 In concluding the applicant reiterates the comments that administrative, service fees and management fees do not constitute trading at any substantial level. The principal activities of the respondent are to provide services under the RJCP which are not trading activities but free services to provide support and training to indigenous job seekers. As earlier mentioned the RJCP is a government funded initiative and it is the view of the applicant that each application is within the jurisdiction of the Commission.

Conclusion

31 The issues to be determined in this matter when ascertaining whether the respondent is a trading corporation are the character of the activities carried on by the organisation at the relevant time and whether or not it is engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

32 Whether a corporation is a trading corporation is essentially a matter of fact, ***Visser v Eral Pty Ltd*** (2007) WAIRC 01148; (2008) 87 WAIG 2850 at [13]. In the ***Lawrence*** at [139] decision it was said of the nature of a trading organisation:

> In determining whether a corporation is a trading corporation, the primary focus is on the activities of the corporation.

33 In ***R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)*** (1979) 143 CLR 190 (***Adamson***) the High Court held that a corporation will be a trading corporation if trading is a substantial corporate activity. The court declined to apply the nature and purpose test. Mason J said of a 'trading corporation':

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

34 The 'activities test' has been applied ever since: ***State Superannuation Board v Trade Practices Commission*** (1982) 150 CLR 282; ***Fencott v Muller*** (1983) 152 CLR 570; ***The Commonwealth of Australia v The State of Tasmania*** (1983) 158 CLR 1 ***(Tasmanian Dam Case); New South Wales v Commonwealth*** (2006) 229 CLR 1 (***Work Choices Case***) at [157], [158].

35 The information and documentation presented by the respondent is, in large part disputed by the applicant.

36 The Commission finds that whether the respondent is trading or not is unclear as the time frame in which the information has been presented was not relevant for the purposes of the onset of the respondent's commercial division. The respondent submitted a commercial division was commenced within the organisation for the provision of services on a fee for service basis for incorporation members. The assertion by the respondent was:

> This commercial division had commenced at the time of termination of the Applicant.
>
> ([4] respondent's submissions 13 June 2014)

37 In determining the character of an organisation in terms of trading being carried on at the relevant time the respondent submits it commenced its commercial or trading operations at the time the applicant was made redundant, 16 January 2014. The Commission finds the commercial operations of the respondent were not carried on during the relevant period, that being during the employment of the applicant.

38 Additionally, the 2013/2014 financial year profit and loss statements attached to the Ms Murphy's statutory declaration, were presented for a period during which the applicant was not employed. The applicant was first employed by the respondent on 14 May 2012 and was made redundant on 16 January 2014. The Commission finds the presentation of the respondent's profit and loss statements were in part presented for a period during which the applicant was not employed.

39 The respondent claims its trading activities for the 2013/2014 financial year to be substantial, namely 39% of total income received. Based on the submissions of the applicant the Commission finds that matters relied on as trading income are

somewhat in doubt. For example the trading information provided by the respondent relating to the Imintji Store should not be considered by the Commission as it is not a principal activity of the respondent. Further, the profit and loss statement for Frilled Enterprises Pty Ltd should in the view of the applicant be disregarded given there was on the general report submitted to ORIC for the year ending 30 June 2013 no mention at all except to comment that they had a zero bank balance. The Commission does not find for the applicant or the respondent however the Commission finds there is insufficient information provided by the respondent to rely on the income from Imintji Store or Frilled Enterprises Pty Ltd in the 2013/2014 financial year for the purposes of trading.

40 The Commission does not consider, based on the information before it, that the respondent satisfies the trading corporation tests given:

1. The profit and loss statements presented in the statutory declaration by Ms Murphy for the 2013/2014 financial year were presented for a period, during which the applicant was only in part employed;
2. Each of the three profit and loss statements presented in the statutory declaration by the CEO for the 2013/2014 financial year was stamped DRAFT which casts some doubt over the veracity of the information as presented;
3. The respondent commenced its commercial or trading operations on or about the time the applicant was made redundant, 16 January 2014; and
4. The assertion by the respondent that income from Imintji Store and Frilled Enterprises Pty Ltd in the 2013/2014 financial year fails to contribute to the overall percentage of income relied on by the respondent as trading.

41 Accordingly, the Commission considers that, based on the available information, Winun Ngari Aboriginal Corporation is not a constitutional corporation in trade and commerce and the Commission does have jurisdiction to consider the s 29(1)(b)((i) claim by the applicant as filed in the Commission. The Commission will issue a declaration in the form of a Minute determining that the Commission has jurisdiction to enquire into and deal with this matter. The Commission will issue an Order shortly.

42 The next step will be the listing of a conciliation conference at a time convenient to the parties.

Denied Contractual Benefits Claim

43 On this claim there is a dispute between the parties. The respondent submits that the applicant's employment was regulated at minimum levels by the modern awards of the *Fair Work Act 2009* (Cth), those being the *Clerks – Private Sector Award 2010* and/or the *Labour Market Assistance Industry 2010.* The respondent submits the applicant's claim forms part of termination relief and is for potential payments relating to the operation of a contract and is therefore outside the jurisdiction of the Commission. However, on the Notice of Answer as submitted by the respondent the advice submitted is that the applicant was employed pursuant to the *Aboriginal Communities and Organisations Western Australian Interim Award 2011.*

44 The applicant submits that she was employed pursuant to the *Aboriginal Communities and Organisations Western Australian Interim Award 2011.*

45 As noted in the Industrial Appeal Court Decision ***Matthews v Cool or Cosy Pty Ltd*** *[2004] WASCA 114;* (2004) 84 WAIG 2152 (Cool or Cosy), the Commission in dealing with a claim referred under s 29(1)(b)(ii) by an employee is enforcing the terms of a common law contract, the Commission is not enforcing its own order or award.

46 Kenner C in his decision in ***Saldanha v Fujitsu Australia Pty Ltd*** [2008] (2008) 89 WAIG 76 [317] examined the decisions in ***Cool or Cosy*** and concluded in that regard:

> On the basis of the views expressed by the members of the Court in *Matthews*, contractual benefits claim is may therefore be regarded as common law based claims for a range of remedies arising from the denial by an employer of a benefit due to an employee or former employee under the contract of service. Such are able to be recovered before the Commission as part of the Commission's jurisdiction to inquire into and 'deal with' an industrial matter of this particular kind. Importantly however, although the source of such a claim is the common law, the capacity to enforce it is a statutory function, pursuant to the powers conferred on the Commission by the Parliament in s 23(1) of the [*IR Act*].

47 In ***Saldanha v Fujitsu Australia Pty Ltd***, the Full Bench examined the Commissions powers and jurisdiction in dealing with an industrial matter referred under s 29(1)(b)(ii). Ritter AP referred to his own decision in ***Health Services Union of Western Australia (Union of Workers) v Director General of Health in right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service*** [2008] WAIRC 00215 (2008) 88 WAIG 543 [173] when he said:

> On the contrary if the Commission is arbitrating a claim referred by an employee under s 29(1)(b)(ii) of the *Act* which asserts they have not been given the contractual entitlement, the Commission must decide what the terms of the contract were and whether or not they have been complied with by the employer. The Commission does not have licence to add to or subtract from the terms of the contract or the facts and order, for example, that a benefit be given to an employee because they think it would be equitable or fair. The terms of the contract cannot be disregarded as '*technicalities or legal forms'* or for any other reason supposedly supported by s 26(1)(a) of *the Act.*

48 At [122] Ritter AP went on to say:

> … the determination of a denial of contractual benefits claim by the Commission does involve the enforcement of legal rights and the exercise of judicial power. Put simply and at risk of repeating myself, a benefit to which someone is entitled under his or her contract of employment is an existing legal right; and the way in which the Commission deals with a claim that it has not been 'allowed' is, as made clear in *Cool or Cosy*, in accordance with the common law.

49 A claim under s 29(1)(b(ii) is determined upon common law principles. The process is the same as that for enforcement of courts of appropriate jurisdiction. The Commission finds that the applicant's employment with the respondent was regulated pursuant to a state award, the *Aboriginal Communities and Organisations Western Australian Interim Award 2011*

50 The Commission, having regard to ***Cool or Cosy*** is unable to enforce its own order or award. Accordingly, the Commission finds that the applicant's s 29(1)(b)(ii) claim is outside the jurisdiction of the Commission given the terms of the applicant's employment were regulated pursuant to the terms of a state award.

51 Accordingly, the Commission will issue an Order will issue dismissing the denied contractual benefits claim.

2014 WAIRC 01124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE NICOLE LAWSEN
	APPLICANT
	-v-
	WINUN NGARI ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 8 OCTOBER 2014
FILE NO/S	U 37 OF 2014, B 37 OF 2014
CITATION NO.	2014 WAIRC 01124

Result	Order issued
Representation	
Applicant	Ms K N Lawsen
Respondent	Mr G Power and Ms S Murphy

Order

HAVING HEARD Ms K N Lawsen by way of written submissions and Mr G Power and Ms S Murphy by way of written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby:

1. DECLARES THAT the Commission has jurisdiction to enquire into and deal with application U 37/2014.
2. ORDERS THAT application B 37/2014 be, and is hereby dismissed for want of jurisdiction.

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

2014 WAIRC 01191

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SOLOMON MWALE
	APPLICANT
	-v-
	MR JONATHAN THROSSELL (CEO)
	SHIRE OF MUNDARING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 22 OCTOBER 2014
FILE NO/S	B 157 OF 2014
CITATION NO.	2014 WAIRC 01191

Result	Application dismissed

Order

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

WHEREAS on the 2nd day of September 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 16th day of October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01219

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETERKIN KWAWELE NTINI

APPLICANT

-v-

DANIEL TAPPER PEARL RECRUITMENT PTY LIMITED

RESPONDENT

CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 28 OCTOBER 2014
FILE NO/S	B 80 OF 2014
CITATION NO.	2014 WAIRC 01219

Result	Application discontinued
Representation	
Applicant	Mr PK Ntini
Respondent	Mr D Tapper (of counsel)

Order

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

AND WHEREAS on 21 July 2014 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS on 24 October 2014 the signed Notice of Discontinuance in respect of the application was filed;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01194

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANJA ROSSOUW

APPLICANT

-v-

MARK TREVOR CONNOR (SOLE TRADER) TRADING AS CHEMMART PHARMACY SUPERSTORE ROCKINGHAM

RESPONDENT

CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 23 OCTOBER 2014
FILE NO/S	U 111 OF 2014
CITATION NO.	2014 WAIRC 01194

Result	Application dismissed
Representation	
Applicant	Mr B Dawkins of counsel
Respondent	Ms S Owen as agent

Order

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

WHEREAS on the 11th day of August 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to continue discussions with a view to reaching agreement; and

WHEREAS on the 20th day of October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01129

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01129
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 1 OCTOBER 2014
DELIVERED	**:**	MONDAY, 13 OCTOBER 2014
FILE NO.	**:**	B 135 OF 2014
BETWEEN	**:**	ANJA ROSSOUW
		Applicant
		AND
		PETA BENNETT INVESTMENTS PTY LTD
		Respondent

CatchWords	**:**	Denied contractual entitlements – Entitlement to payment of notice – Contract of employment – Alleged serious misconduct – Summary termination for misconduct – Interpretation of contractual terms – Common law principles relating to breach of a term or repudiation of a contract – National system employer
Legislation	**:**	*Fair Work Act 2009* s 117, s 123
		Fair Work Regulations 2009
		Industrial Relations Act 1979 s 29(1)(b)(ii)
Result	**:**	Decision issued
Representation:		
Applicant	**:**	Mr B Dawkins of counsel
Respondent	**:**	Ms S Owen as agent

Reasons for Decision

1 The applicant claims that she has not been allowed by her employer a benefit, not being a benefit under an award or order, to which she is entitled under her contract of employment (*Industrial Relations Act 1979* s 29(1)(b)(ii) (the Act)).

2 The applicant was employed by the respondent as Pharmacist in Charge of Pharmacy 777 Mandurah Carpark Chemist. The parties agree that they entered into a contract of employment dated 4 November 2013. On 12 November 2013, the applicant was dismissed for alleged serious misconduct. The applicant denies that she misconducted herself and says that she is entitled to be paid notice in accordance with the contract of employment.

3 The respondent says that according to the terms of the contract, serious misconduct negates any entitlement to notice. Further, the respondent is a national system employer and the *Fair Work Act 2009* (Cth) (the FW Act) and the *Fair Work Regulations 2009* (the FW Regulations) apply to the employment. The applicant's employment was subject to the *Community Pharmacy Multiple Business Agreement (Western Australia)* (the Agreement), an agreement under the FW Act. The respondent says that the provisions for notice contained in both the Agreement and in Division II – Notice of termination and redundancy pay, Subdivision A – Notice of termination or payment in lieu of notice of the FW Act, do not apply when an employee is dismissed for serious misconduct.

4 The whole of the matter was set down for hearing on Wednesday, 1 October 2014. At 9.15 am that day, the applicant filed a further outline of submissions which included a new submission that even if the applicant had been justifiably dismissed for a serious or persistent breach of the contract, the particular terms of the contract still require payment of notice. The parties made submissions on this issue alone as, if the applicant's contention is correct, there will be no requirement for a hearing and determination of whether the applicant has misconducted herself as the claim will be made out. If the applicant is not correct, then that issue of misconduct will need to be heard and determined.

The contractual term

5 The applicant entered into a contract of employment with Peta Bennett Investments Pty Ltd as trustee for Carpark Chemist Trust (Pharmacy 777 Mandurah Carpark Chemist), referred to in the contract as 'Carpark'.

6 The contract provides for termination and notice in the following terms:

> **Termination**
>
> Carpark may immediately terminate your employment by notice to you in writing if you at any time commit any serious or persistent breach of this contract including, without limitation, intentional disobedience, inappropriate conduct or behaviour, dishonesty, serious or persistent breach of duty or serious or persistent neglect.
>
> Thirty days (30 working days) notice is required and must be given in writing. This applies to either party.

7 The remainder of the clause deals with payments due on termination and the return of the employer's property.

The applicant's argument

8 The applicant says that the first two paragraphs of the contract under the heading '**Termination**' are to be read together, and that the term 'notice' has the same meaning in each paragraph. That meaning is that 'notice' is defined in the second paragraph to mean 30 days' notice. This is to be applied to the requirement for the provision of notice, in the first paragraph, including in the circumstances of serious or persistent breach of contract, that is, serious misconduct. Therefore, the applicant says it does not matter that the dismissal is said to be for serious misconduct, the notice is still to be provided.

The respondent's argument

9 The respondent argues, firstly, that the two paragraphs of the termination clause relating to notice are to be read separately. The first paragraph deals with circumstances where termination is immediate, or summary, and the reference to notice is that notice of termination is to it being given in writing.

10 Reference in the second paragraph to 'thirty days (30 working days) notice' is said to be the notice period applicable to termination which is not immediate or summary.

Consideration and conclusions

11 This matter requires interpretation of the meaning to be applied to the terms of the contract and 'what a reasonable person would understand by the language in which the parties have expressed their agreement' (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]).

12 The particular terms of a contract are to be considered in light of the whole text of the contract (*Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109). Each word and phrase is to be given meaning in context.

13 In this case, the contract makes no other reference to notice being given or to termination of employment other than is contained in the clause headed 'Termination'. However, it contains a provision under the phrase, 'Term of Contract: 24 months'. The following two paragraphs provide for a probationary period, a formal performance review at the completion of the probationary period and the fixing of salary.

14 I take this provision to mean that this is ongoing employment, with the first six months being a probationary period, and the 24 months being 'a yardstick on performance, outcomes and results.' Salary will be reviewed at the completion of the 'first 24 months'. I do not find that this means the employment will come to an end by the effluxion of time at the end of the 24 months.

The termination provisions

15 The first paragraph, headed 'Termination', deals with the employer bringing the contract to an end. The phrase 'Carpark may immediately terminate your employment by notice to you in writing if you at any time commit any [serious misconduct]' is to be considered in its context. It deals with immediate or summary termination for misconduct at the employer's initiative. This can be brought about 'by notice to you in writing'.

16 The second paragraph deals not with immediate or summary dismissal for misconduct but with termination on notice by either party. This is because, firstly, this paragraph deals with notice applying to both parties, whereas the first paragraph deals with the employer's right to unilaterally and immediately terminate. Secondly, it sets out what period of notice is required and that

it must be in writing. If notice in this paragraph is to have the same meaning for the first paragraph, there would be no need to repeat that it must be in writing.

17 Therefore, I conclude that each paragraph deals with a different circumstance. In the first paragraph, 'notice' means 'notice in writing', not a period of notice. There is no period of notice required because termination is immediate and is at the initiative of the employer. In the second paragraph, notice refers to the period each party must give to the other for termination in the ordinary course. It must also be in writing.

18 Accordingly, the contract does not require the employer to give 30 working days' notice where the employer terminates the employment immediately due to serious misconduct by the employee.

19 At common law, an employee who commits serious misconduct is not entitled to notice. However, a contract of employment may provide terms and conditions which are more advantageous but not less advantageous to the employee than legislation or other instruments such as awards and agreements. The interpretation I have applied above is in keeping with the common law principles relating to breach of a term or repudiation of a contract, where summary dismissal without notice usually applies (see *Printing Industry Employees Union of Australia v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175; *North v Television Corporation Ltd* (1976) 11 ALR 599). However, what matters in this case is the meaning of the terms of the contract, as that is what the applicant is entitled to seek to enforce under s 29(1)(b)(ii) of the Act.

The Agreement

20 The respondent also refers to the provisions of the FW Act and FW Regulations, and to the Agreement, which is an agreement made under the FW Act. The Agreement provides that 'in order to terminate the employment of an employee, the employer must give the employee the period of notice' specified in a table in cl 10 – Notice of Termination by Employer. At cl 10.6.1, it provides that the period of notice in the clause does not apply in the case of dismissal for serious misconduct.

21 In *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284 at 289, the High Court found that the provisions of an award, which provide for a lesser period of notice, 'do not interfere with the rights of the parties with respect to longer notice by contract or otherwise'; that is, the award, or in this case the Agreement, does not have the effect of cutting down more beneficial provisions of the contract to the minimum conditions prescribed by the award, or in this case the Agreement. The terms of the contract, if they are more beneficial to the employee than the award or the Agreement, continue to apply.

22 Breen Creighton and Andrew Stewart in *Labour Law* (5th ed, Federation Press) deal with the relationship of statutory provisions arising under the FW Act and contract terms for notice of termination. They note that where the FW Act applies to the employment, as in this case, s 117 of the FW Act enshrines the minimum standard of notice for national system employees. Section 123 sets out a series of exceptions to the requirements for notice set out in s 117. The authors note:

> Given that s 117 is part of the [National Employment Standards], it is clear that it sets a minimum standard only, and that parties may reach agreement on terms more favourable to the employee.
>
> Creighton W B and Stewart A *Labour Law* (5th ed, 2010) [18.16]

23 They also note that enterprise agreements may also specify periods of notice for employees. They comment that the ordinary common law doctrines governing discharge of contracts apply to summary dismissal where there has been serious misconduct, and refer to *North v Television Corp Ltd* (1976) 11 ALR 599. They say:

> The right to summary dismissal will be available to an employer no matter what other provision is made in the contract as to termination unless the right has been expressly or impliedly excluded.
>
> Creighton W B and Stewart A *Labour Law* (5th ed, 2010) [18.27]

24 Where the right is expressly preserved, without the apparent reference to common law, common law principles are generally accepted as being embodied in the provisions (for example, *Printing Industry Employees Union of Australia v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175; *North v Television Corp Ltd* (1976) 11 ALR 599.

25 In this case, the right to summarily dismiss is explicit in the contract and is not expressly or impliedly excluded.

26 The applicant does not seek to enforce an entitlement under the FW Act or the Agreement. She seeks to enforce the entitlement agreed between herself and her employer, said to be contained in her contract of employment.

27 In any event, the term in the contract providing for immediate termination of employment by the respondent in circumstances where the employee has engaged in serious misconduct is consistent with common law principles, is not expressly or impliedly excluded, and is not inconsistent with the terms of the Agreement or the National Employment Standards.

Summary

28 The provisions of the contract in relation to termination do not provide an entitlement to notice in circumstances of dismissal for serious misconduct.

29 The matter of whether the applicant has committed serious misconduct such as to justify immediate termination will be set down for hearing.

2014 WAIRC 01134

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PAULA ELAINE RUCHOTZKE

APPLICANT

-v-

VANCAL PTY LTD T/AS GMT (GROVES MANUFACTURING AND TOOLING)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE TUESDAY, 14 OCTOBER 2014
FILE NO/S U 173 OF 2014
CITATION NO. 2014 WAIRC 01134

Result Application discontinued
Representation
Applicant Ms P E Ruchotzke
Respondent Mr S Groves

Order

HAVING heard Ms P E Ruchotzke on her own behalf and Mr S Groves on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2014 WAIRC 01225

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHAUN SALISBURY

APPLICANT

-v-

RONNIE HILL - MCKAY DRILLING PTY LTD

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE WEDNESDAY, 29 OCTOBER 2014
FILE NO/S B 197 OF 2013
CITATION NO. 2014 WAIRC 01225

Result Application discontinued
Representation
Applicant Ms A Bevis (as agent)
Respondent Mr D Cooper (of counsel)

Order

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

AND WHEREAS on 13 May 2014, 26 August 2014 and 24 October 2014 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 24 October 2014 agreement was reached between the parties;

AND WHEREAS on 28 October 2014 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2014 WAIRC 01067

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	T
	APPLICANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 25 SEPTEMBER 2014
FILE NO/S	U 87 OF 2010
CITATION NO.	2014 WAIRC 01067

Result	Order issued
Representation	
Applicant	Mr W Burg of counsel
Respondent	Ms R Young of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

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

2014 WAIRC 01218

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE TIMSON
	APPLICANT
	-v-
	THERAPY FOCUS INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 27 OCTOBER 2014
FILE NO/S	U 189 OF 2014
CITATION NO.	2014 WAIRC 01218

Result	Discontinued
Representation	
Applicant	Ms A McKay (of counsel)
Respondent	Mr T Barrie (of counsel) and Mr J Hart (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979.*

The Commission set down a conference for 17 October 2014 for the purpose of conciliating between the parties.

Prior to the conference taking place on 17 October 2014, the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Jenny Rasinkov	Ultra Insurance Solutions Pty Ltd	U 198/2014	Chief Commissioner A R Beech	Discontinued
Kofi Awuah	Autism Association of Western Australia	U 187/2014	Commissioner J L Harrison	Consent Order issued
Robyn Wellstead	Southside Care	U 194/2014	Commissioner J L Harrison	Consent Order issued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Civil Service Association of Western Australia (Inc)	Mr R Chalmers Director General Disability Services Commission	Scott A/SC	PSAC 17/2014	25/08/2014	Dispute re Commuted Shift Mobility Allowance (CSMA) paid to Social Trainers employed by the respondent	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Minister for Health is incorporated as the board of the Hospitals formerly comprised in the Metropolitan Health Service Board under s7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Director General of Health	Mayman C	PSAC 1/2014	23/01/2014 24/01/2014 31/01/2014 4/02/2014 17/03/2014 21/03/2014	Dispute re roster changes	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Harrison C	PSAC 21/2013	29/07/2013	Dispute re alleged unfair treatment of Union member	Concluded
The State School Teachers' Union of W.A. (Incorporated)	The Governing Council of Challenger Institute of Technology	Scott A/SC	C 28/2014	22/09/2014 9/10/2014	Dispute re alleged unfair, harsh and unlawful summary dismissal	Discontinued
United Voice WA	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board	Scott A/SC	C 13/2014	24/04/2014 6/05/2014 12/05/2014	Dispute re use of fixed terms contracts	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
United Voice WA	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health Services Board	Harrison C	C 146/2013	22/04/2013	Dispute re dismissal on 15 January 2013	Concluded
United Voice WA	The Roman Catholic Archbishop of Perth Seton Catholic College	Kenner C	C 10/2014	16/04/2014	Dispute re demotion of employee due to alleged misconduct	Discontinued
United Voice WA	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the WA Country Health Service	Mayman C	C 238/2013	11/12/2013	Dispute re roster change	Discontinued
United Voice WA	The Minister for Health in his incorporated capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the WA Country Health Service	Mayman C	C 237/2013	11/12/2013	Dispute re roster change	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 01125

TEACHERS (PUBLIC SECTOR PRIMARY AND SECONDARY EDUCATION) AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 9 OCTOBER 2014

FILE NO. APPL 8 OF 2014

CITATION NO. 2014 WAIRC 01125

Result Recommendation issued

Recommendation

WHEREAS this is an application to amend the *Teachers (Public Sector Primary and Secondary Education) Award 1999* to increase the Locality Allowances set out in Schedule E; and

WHEREAS on Thursday the 8th day of May 2014, Friday the 20th day of June 2014, Tuesday the 26th day of August 2014, and Wednesday the 8th day of October 2014 the Commission convened conferences in this matter; and

WHEREAS at the conference on Tuesday the 26th day of August 2014 the respondent provided a written response to the applicant's claim; and

WHEREAS on Wednesday the 8th day of October 2014 the applicant provided a written response; and

WHEREAS at the conference on Wednesday the 8th day of October 2014 the respondent requested time to seek instructions before responding to the applicant; and

WHEREAS Commission is of the opinion that it is appropriate and may be of assistance to the resolution of the dispute to issue recommendations as to how the matter ought to progress;

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

1. THAT the parties report back to the Commission at a conference to be convened in the first week of December 2014.

2. THAT prior to the conference referred to in Recommendation 1:

   (a) The respondent provide to the applicant in writing its position in response to the applicant's proposal of 8 October 2014; and

   (b) The parties meet and discuss the matter with a view to reaching agreement on the application or regarding how the matter should proceed.

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

2014 WAIRC 01247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01247
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	TUESDAY, 4 NOVEMBER 2014 BY WRITTEN CORRESPONDENCE
DELIVERED	**:**	THURSDAY, 6 NOVEMBER 2014
FILE NO.	**:**	B 63 OF 2013, B 64 OF 2013, B 65 OF 2013, B 164 OF 2013
BETWEEN	**:**	ANDJELKO BUDIMLICH AND OTHERS Applicants AND J-CORP PTY LTD Respondent

CatchWords	**:**	Industrial law – Evidence relating to the profits or financial position of a party – Evidence not be published without the consent of the person entitled to the non-disclosure
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 33(3)
Result	**:**	Orders made
Representation:		
Applicant	**:**	Mr P Mullally
Respondent	**:**	Ms J Howard, of counsel

Reasons for Decision

1 On 13 October 2014 the respondent filed a number of affidavits with annexures which contain evidence relating to the respondent's profits or financial position which will form the basis of its evidence in opposition to the claims made against it. The respondent has applied for orders to issue that the annexures not be published or otherwise disclosed to the public or any person not authorised by the respondent to view the documents. Further an order will require the applicants to return to the respondent's representative all and any copies of the annexures within 14 days of the conclusion of the hearing in these matters.

2 The applicants do not oppose the orders sought in principle and submit that the annexures would be returned subject only to their need for them in the event of an appeal. The respondent recognises this.

3 I agree the orders sought do give effect to s 33(3) of the *Industrial Relations Act 1979* and should issue. From a practical point of view, the order sought will require the applicants to return the annexures at the conclusion of the hearing. However the parties will not know the result of the case until the Commission's decision issues, and will not know whether there will be an appeal until 21 days after the order is made. It seems to me the order sought by the respondent should issue with a period of 21 days of the order concluding these matters in lieu of the proposed 14 days of the conclusion of the hearing, and provide that in the event of an appeal in these matters the applicants shall return to the respondent's representative all and any copies of the annexures within 14 days of the conclusion of the hearing of the appeal.

4 A minute to that effect now issues.

2014 WAIRC 01248

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDJELKO BUDIMLICH AND OTHERS
	APPLICANTS
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 7 NOVEMBER 2014
FILE NO/S	B 63 OF 2013, B 64 OF 2013, B 65 OF 2013, B 164 OF 2013
CITATION NO.	2014 WAIRC 01248

Result	Orders made pursuant to s 33(3)
Representation	
Applicants	Mr P Mullally (by written correspondence)
Respondent	Ms J Howard, of counsel (by written correspondence)

Order

WHEREAS on 3 November 2014, the respondent applied for orders to be made pursuant to s 33(3) of the *Industrial Relations Act 1979* (the Act);

AND HAVING HEARD Ms J Howard, of counsel on behalf of the respondent and Mr P Mullally on behalf of the applicants;

NOW I, the undersigned, pursuant to the powers conferred on me under the Act hereby order –

1. THAT the annexures to the affidavits of Tonya Miller, Stuart Brown and Rob Lione not be published or otherwise disclosed to the public or any person not authorised by the respondent to view the documents.
2. THAT the applicants return to the respondent's representative all and any copies of the annexures within 21 days of the order concluding these matters.
3. PROVIDED that in the event of an appeal in these matters the applicants shall return to the respondent's representative all and any copies of the annexures within 14 days of the conclusion of the hearing of the appeal.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2014 WAIRC 01138

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERRI COLLINS
	APPLICANT
	-v-
	THE LOWER GREAT SOUTHERN FAMILY SUPPORT ASSOCIATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 16 OCTOBER 2014
FILE NO.	U 124 OF 2014
CITATION NO.	2014 WAIRC 01138

Result	Direction issued
Representation	
Applicant	Mr R Lewis of counsel
Respondent	Ms R Airey of counsel

Direction

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

WHEREAS the application was set down for a Directions hearing on the 3rd day of October 2014; and

WHEREAS the Commission proposed that Directions issue for the preparation of the hearing of the application for an extension of time and heard from the parties; and

WHEREAS the parties conferred and agreed to Directions issuing;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby directs:

1. THAT the parties file a Statement of Agreed Facts annexing any agreed documents relevant to those facts by the 28th day of October 2014.
2. THAT by the 14th day of November 2014 the applicant file and serve:
   (a) a written Outline of Submissions;
   (b) any witness statements constituting the whole of the evidence in chief of the witnesses she intends to rely upon;
   (c) any further documentary evidence including a List of Authorities she intends to rely upon.
3. THAT by the 28th day of November 2014 the respondent file and serve:
   (a) a written Outline of Submissions;
   (b) any witness statements constituting the whole of the evidence in chief of the witnesses it intends to rely upon;
   (c) any further documentary evidence including a List of Authorities it intends to rely upon.
4. THAT the application for an extension of time be listed for hearing for half a day on a date to be fixed in December 2014.
5. THAT the parties provide their unavailable dates for such hearing by the 28th day of October 2014.

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

2014 WAIRC 01222

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON SMITH
	APPLICANT
	-v-
	THE DEPARTMENT OF EDUCATION (WA)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 28 OCTOBER 2014
FILE NO.	U 200 OF 2014, B 200 OF 2014
CITATION NO.	2014 WAIRC 01222

Result	Direction issued
Representation	
Applicant	Mr S Smith on his own behalf
Respondent	Mr D Matthews of counsel and with him Ms J Rhodes of counsel

Direction

WHEREAS these are applications pursuant to Sections 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and

WHEREAS the Commission convened a Directions hearing on the 28th day of October 2014; and

WHEREAS the Commission is of the opinion that the issuing of the Directions will assist in the conduct of the hearing of the matters;

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

1. THAT in respect of application U 200 of 2014 the applicant file with the Commission and serve on the respondent a brief statement of the reasons for the delay in the filing of the claim by the 18th day of November 2014.

2. THAT the applicant file with the Commission and serve on the respondent brief particulars of the basis of each claim and what he seeks in dot point form by the 18th day of November 2014.

3. THAT in respect of application B 200 of 2014 the respondent file with the Commission and serve on the applicant any application pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* within 21 days of receipt of the documents referred to in directions 1 and 2.

4. THAT a hearing be set down in January or February 2015 to deal with:

    1. The application for an extension of time in which to file application U 200 of 2014;

    2. The issue of whether there was a dismissal; and

    3. Any application that the respondent may make under s 27(1)(a)(ii) of the *Industrial Relations Act 1979*.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Harvey Enterprise Agreement 2014 AG 17/2014	28/10/2014	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Harvey	Commissioner J L Harrison	Agreement registered
Shire of Narembeen Works Staff Enterprise Bargaining Agreement 2014 AG 16/2014	23/10/2014	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Narembeen	Commissioner J L Harrison	Agreement registered

RECLASSIFICATION APPEALS—

2014 WAIRC 01163

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MISS DIANA ALFONSI

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 20 OCTOBER 2014

FILE NO PSA 23 OF 2013

CITATION NO. 2014 WAIRC 01163

Result Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01161

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS CHRISTINA ANDERSON
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 19 OF 2013
CITATION NO.	2014 WAIRC 01161
Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS JANET ASLAN
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 6 OF 2013
CITATION NO.	2014 WAIRC 01148
Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS CHRISTINE ATKINSON
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 13 OF 2013
CITATION NO.	2014 WAIRC 01155
Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01168

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS EILEEN BELL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 28 OF 2013
CITATION NO.	2014 WAIRC 01168
Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01160

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS LAUREN BENSTED
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 18 OF 2013
CITATION NO.	2014 WAIRC 01160

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01149

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS TAMICA CARDY
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 7 OF 2013
CITATION NO.	2014 WAIRC 01149

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01158

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS DEBORAH CLARKE
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 16 OF 2013
CITATION NO.	2014 WAIRC 01158

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01157

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS ALANI COOK
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 15 OF 2013
CITATION NO.	2014 WAIRC 01157

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01164

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS CARRISA DICKEY
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 24 OF 2013
CITATION NO.	2014 WAIRC 01164

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01169

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS GAYNOR GALE
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 29 OF 2013
CITATION NO.	2014 WAIRC 01169

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01151

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS TAMMY HAMMILL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 9 OF 2013
CITATION NO.	2014 WAIRC 01151

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01162

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS AMANDA HARRIS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 20 OF 2013
CITATION NO.	2014 WAIRC 01162

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01165

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS KATHRYN HOLMES
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 25 OF 2013
CITATION NO.	2014 WAIRC 01165

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01166

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS KATE KYLE
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 26 OF 2013
CITATION NO.	2014 WAIRC 01166

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01152

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS PETA LONCAR
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 10 OF 2013
CITATION NO.	2014 WAIRC 01152

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01167

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS ANNE LONG
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 27 OF 2013
CITATION NO.	2014 WAIRC 01167

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01153

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS CHRISTINA MORRISON
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 11 OF 2013
CITATION NO.	2014 WAIRC 01153

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01170

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS KERRY NANKIVELL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 30 OF 2013
CITATION NO.	2014 WAIRC 01170

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS LEANNE SHARPLES
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 8 OF 2013
CITATION NO.	2014 WAIRC 01150

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01156

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS ROBYN THOMAS
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 14 OF 2013
CITATION NO.	2014 WAIRC 01156

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01159

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS LISA VAN MANEN
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 17 OF 2013
CITATION NO.	2014 WAIRC 01159

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS DIANA VERNON
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 20 OCTOBER 2014
FILE NO	PSA 12 OF 2013
CITATION NO.	2014 WAIRC 01154

Result	Application dismissed

Order

HAVING heard Ms K Heal on behalf of the applicant and Mr J Ross and Mr R Gabelish on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby orders:

THAT this application be, and is hereby dismissed.

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

2014 WAIRC 01131

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS SONIA WADE
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON
DATE	MONDAY, 13 OCTOBER 2014
FILE NO	PSA 74 OF 2013
CITATION NO.	2014 WAIRC 01131

Result	Discontinued
Representation	
Applicant	Ms K Heal (as agent)

Order

This is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*.

On 2 October 2014 the applicant filed a Notice of Withdrawal or 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 discontinued.

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

2014 WAIRC 01223

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01223
CORAM	**:**	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 27 OCTOBER 2014
DELIVERED	**:**	WEDNESDAY, 29 OCTOBER 2014
FILE NO.	**:**	PSA 66 OF 2008, PSA 67 OF 2008, PSA 68 OF 2008
BETWEEN	**:**	ROBIN WESTERN VICKI POPE CAROL CARMODY Applicants AND 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

CatchWords	**:**	Reclassification appeal – Work value – Statement of Principles – Principle 7 – BiPERS assessment – Increase in work volume – Essential selection criteria – Education standard
Legislation	**:**	
Result	**:**	Applications dismissed
Representation:		
Applicant	**:**	Ms P Marcano (as agent)
Respondent	**:**	Mr J Sheppard

Reasons for Decision
(Given extemporaneously at the conclusion of the proceedings as edited by the Commission)

1 The applicants seek the reclassification of the position of Assistant in Pharmacy at Narrogin Hospital, WACHS – Wheatbelt, from level 2 to level 3, and a change in the title to Pharmacy Supply Officer.

2 The current job description form (JDF) describes the responsibilities or prime functions of the existing position as being:

> … to assist the Regional Pharmacist in the provision of a comprehensive pharmaceutical service to Narrogin Regional Hospital, District Hospitals and other service points within the Upper and Central Great Southern, through the operation of an efficient drug distribution system.

3 The applicants say that the position has expanded significantly since it was last reclassified in 1994. There has been a significant increase in the size of the pharmacy service, from what was a district-based service to a full regional service. It is said that this position is required to work more autonomously, to have a higher level of communication and interpersonal skills and is involved in training others. I note, in particular, the list of duties and responsibilities which Ms Pope has set out as being of a higher level than previously.

4 The applicants also refer to other positions classified at Level 3, which they say have similar levels of skill and responsibility.

5 On the other hand, the respondent relies on a number of assessments of the position, including an assessment in January 2008. I also note that the position falls within the overall review of pharmacy assistant and technician positions that was undertaken in July 2010, and that there was a further review of this position undertaken in July 2014.

6 The respondent says that there has been structural change to the organisation and increased workflow, but not a significant net addition to work value.

The Work Value test

7 The work value test is reflected in the Statement of Principles arising from the State Wage decision as follows:

> **7. Work Value Changes**
>
> 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
>
> 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
>
> 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage 'leapfrogging' arising out of changes in relative position.
>
> *2014 State Wage Order* [2014] 94 WAIG 652
> Schedule 2, [7] Work Value Changes

8 In essence, the test requires there to be a significant net addition to work value (not change in itself) and that is reflected in the nature of the work, skills and responsibility required, or the conditions under which the work is performed.

Consideration

Delay

9 I note the inordinate amount of time that has passed since this matter was first raised. I appreciate that part of the reason for the delay is because the respondent wished to assess all pharmacy assistant and technician positions rather than look at this position in isolation. Without that assessment, there may have been issues of 'leapfrogging' or flow-on. That constitutes a genuine reason for having put this matter on hold. However, the delay has been unfair to the applicants.

Changes to the Work

10 I have considered all of the evidence in this matter, including from the witnesses and all the documentation. It is clear that since 1994 there has been change to the structure and the number of facilities which this position services; there has been an increase in work volume, and new systems have been put in place. The broadening of the area of service has added work volume and some, but limited, increased complexity. However, I am unable to conclude that there is a requirement for a significantly higher level of skill or responsibility in this position. The prime function and responsibilities are still consistent with the 1994 JDF. The conditions under which the work is performed have changed to take account of changes in technology, but not so as to increase the work value.

11 The BiPERS assessment is an aid to and not determinative of a classification. The result in this case demonstrates that the requirements of this position are within the range of HSU level 2.

Essential Criteria – education standard

12 I also wish to note, given the comments made today about the educational standards or requirements, that those things which are set out in JDFs as being the essential educational requirements are to be distinguished from what might be beneficial or desirable requirements. It is what is actually required that is significant. That is not personal to the applicants, but relates to the requirements of the position. It is not a reflection on the personal attributes, commitment or efficiency of the applicants. The essential criterion regarding the education standard required to perform this position remains as it has been for many years.

13 As to the issue of training of co-workers, this is an expectation of all positions and does not of itself constitute a higher level of work generally, unless there is something unusual in that requirement.

14 Therefore, I find that even though there is some change in the work and some change in structure and systems, there has not been a significant net addition to work value and the duties, skills and responsibilities are appropriate for Level 2 positions. The applications will be dismissed.

2014 WAIRC 01224

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBIN WESTERN
	VICKI POPE
	CAROL CARMODY
	APPLICANTS
	-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	WEDNESDAY, 29 OCTOBER 2014
FILE NO	PSA 66 OF 2008, PSA 67 OF 2008, PSA 68 OF 2008
CITATION NO.	2014 WAIRC 01224
Result	Applications dismissed

Order

HAVING heard Ms P Marcano and with her Ms K Heal as agents for the applicants and Mr J Sheppard on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT these applications be, and are hereby dismissed.

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

SCHOOL TEACHERS—Matters dealt with—

2014 WAIRC 01145

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01145
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 5 JUNE 2014, MONDAY, 11 AUGUST 2014, TUESDAY, 12 AUGUST 2014, WEDNESDAY, 13 AUGUST 2014, THURSDAY, 14 AUGUST 2014, FRIDAY, 15 AUGUST 2014
DELIVERED	**:**	FRIDAY, 17 OCTOBER 2014
FILE NO.	**:**	APPL 52 OF 2013
BETWEEN	**:**	STEVEN LOCKWOOD
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
		Respondent

CatchWords	:	Industrial law - Breaches of Code of Conduct - Appeal against findings and penalties imposed on a school Principal - Claim that findings and penalties are harsh, oppressive or unfair
Legislation	:	*Industrial Relations Act 1979* (WA) - s 29(1)
		Public Sector Management Act 1994 (WA) - s 78(2), s 80A, s 80(c), s 82A(3)(b)
		School Education Regulations 2000 - r 38
Result	:	*Finding and penalty in allegation 4 quashed*
		Reprimand appropriate in allegation 2

Representation:

Counsel:		
Applicant	:	Mr J Raftos, of counsel
Respondent	:	Mr D Matthews and Ms C Brandstater, both of counsel
Solicitors:		
Applicant	:	Jackson McDonald
Respondent	:	State Solicitor's Office

Table of Contents

Case(s) referred to in reasons:

Briginshaw v Briginshaw (1938) 60 CLR 336

Steven Lockwood v Director General, Department of Education [2014] WAIRC 00090; (2014) 94 WAIG 155

Pastrycooks Employees, Biscuit Makers Employees and Flour and Sugar Goods Workers Union (NSW) v Gartrell White (1990) 35 IR 60

Reasons for Decision

Background

1 Mr Lockwood, who was employed as the Principal at Nollamara Primary School, was found guilty by the Director General of Education of breaches of discipline and consequently had penalties imposed on him. He has brought this application, which is in substance an appeal under s 78(2) of the *Public Sector Management Act 1994* ('PSM Act'), which is to be dealt with by this Commission as if the Director General's finding was an industrial matter mentioned in s 29(1) of the *Industrial Relations Act 1979*.

2 The application came before Harrison C who heard two preliminary issues: whether the application should be heard as an appeal de novo and, if so, whether the Commission can impose a harsher sanction than that imposed by the Director General. Harrison C decided ([2014] WAIRC 00090; (2014) 94 WAIG 155) that it is appropriate to hear the application as a hearing de novo; and that the Commission can determine any penalty which may be appropriate to apply to Mr Lockwood, and issued a declaration accordingly ([2014] WAIRC 00097; (2014) 94 WAIG 157). The application was then reallocated.

3 With the consent of the parties, a direction was made reflecting their agreement that the Director General would lead her evidence first, that the evidence of the child witnesses shall be heard before the evidence of the adult witnesses; that child witnesses shall provide their evidence by way of CCTV in the presence of a support person from a location outside of the

Commission; and that, as the application is to proceed by way of a hearing de novo, matters relating to procedure are not in issue in the proceedings ([2014] WAIRC 00457; (2014) 94 WAIG 745.

4 An order was made that references to the names of the children who give evidence, or who are referred to in the proceedings, be anonymised in the reasons for decision and final orders to issue; and that the publication of the names of the children, or any matter likely to lead members of the public to identify those children, be suppressed ([2014] WAIRC 00924; (2014) 94 WAIG 1488).

5 After the completion of the evidence called by the Director General, the two witnesses called by Mr Lockwood and his own evidence in chief, Mr Lockwood further amended his application to reduce the scope of his appeal to allegations 2 and 4 only. In relation to each of those two allegations Mr Lockwood denies he acted in the manner described in the findings against him.

Allegation 4

Background

6 The Director General found that between 4 February and 5 March 2013 Mr Lockwood committed a breach of discipline contrary to s 80(c) of the PSM Act in that he used an unreasonable degree of physical force against a student. The Director General found that while in the Registrar's office speaking to the student, he told the student to stop kicking a desk, grabbed the student who was sitting on a chair and threw him to the ground; and that the degree of physical force he used was not reasonable or necessary to manage the student.

7 Mr Lockwood denies that he acted in the manner as alleged. He admits that he instructed the student to stop kicking furniture, which instructions were ignored on several occasions. He placed his hands on the student's shoulders in order to move him away from the furniture so as to prevent the kicking from continuing. He says that the chair on which the student was sitting slipped on its wheels causing him to fall to the floor; this was accidental and not deliberate. He says that in placing his hands on the student's shoulders he acted in accordance with r 38 of the *School Education Regulations 2000* and accordingly denies that he committed an act of misconduct.

The Evidence

8 Only Mr Lockwood and the student had been present; of those two only Mr Lockwood gave evidence in these proceedings. His evidence is essentially what is outlined in his denial set out above. He was not cross-examined on his evidence.

9 The student had been interviewed by the Department of Education's Standards and Integrity Directorate on 8 May 2013 and a transcript of the interview, and a CD of the audio recording of it, are in evidence.

Submissions

10 Mr Lockwood submits that little or no weight should be accorded the student's evidence, pointing out that it is unsworn, the student was not warned about the consequences or gravity of his evidence, he did not review or sign-off the transcript, the recording had commenced after the interview started, the student was not cross-examined and was an 11 year old child who had a traumatic background.

11 Mr Lockwood submits that his own evidence was clear and not challenged and was given in a confident and forthright manner.

12 The Director General submits that she has accepted that there were no reasonable prospects for success in relation to her opposition to Mr Lockwood's application regarding this allegation and has decided not to pursue it. The Director General therefore did not cross-examine Mr Lockwood in relation to his evidence about it.

Consideration

13 I consider the submissions on behalf of Mr Lockwood regarding the evidence on this point are valid. In this allegation, Mr Lockwood's behaviour on the day was very much a matter of controversy and he gave sworn evidence to support his version of the events in question. His evidence was not challenged. The fact that it was not challenged does not mean it must be accepted: rather, it is to be considered in the totality of the evidence in terms of its own weight or cogency (*Pastrycooks Employees, Biscuit Makers Employees and Flour and Sugar Goods Workers Union (NSW) v Gartrell White* (1990) 35 IR 60, 67).

14 I find that Mr Lockwood's evidence is not implausible. I do give it greater weight than the unsworn interview notes and audio interview of the student to the contrary and I accept it. On balance, I find that he did not act as found by the Director General and his application regarding allegation 4 is made out.

15 It was submitted on behalf of the Director General that there is no need for an order quashing the finding and the penalty and that this will be attended to administratively. Nevertheless, Mr Lockwood's application regarding allegation 4 is still before me for determination even though the Director General has chosen not to pursue her opposition to it. An order will issue quashing the finding of the Director General and the penalty with respect to this allegation.

Allegation 2

Background

16 The Director General found that on 6 December 2012 Mr Lockwood committed a breach of discipline contrary to s 80(c) of the PSM Act by committing an act of misconduct. In the letter to Mr Lockwood of 5 July 2013 (Exhibit ED1) the Director General found that:

(a) You are employed as a Principal at Nollamara Primary School.

(b) You approached Mr Warren Knox, teacher, Nollamara Primary School in the staff room and spoke to him regarding a comment he had made about false harmony.

(c) You displayed behaviour towards Mr Knox that he found threatening, including raising your fists while yelling at him.

(d) Mr Knox then left the staff room.

(e) You continued after Mr Knox and yelled at him in the quadrangle area.

(f) You approached Mr Knox whilst he was at the storeroom door and yelled at him.

(g) You displayed behaviour towards Mr Knox that he found threatening, namely when your body made contact with Mr Knox's body while you were attempting to remove a key from the door.

(h) Your actions are contrary to the Department's *Code of Conduct* which states, in part:

1. Personal Behaviour –

Employees treat others with respect, dignity, courtesy, honesty and fairness and with proper regard for their rights, safety and welfare.

17 What happened on 6 December 2012 was an event with several parts. The letter shows that the Director General's finding against Mr Lockwood applied to the event viewed as a whole. Mr Matthews, on behalf of the Director General, submitted that:

> Charge 2 is essentially a course of conduct by Mr Lockwood towards Mr Knox, which includes confronting him straight away, yelling at him, following him around, yelling at him, engaging him on several occasions, yelling at him, and culminating in physical contact.

18 Both Mr Lockwood and the Director General identify the essential issues as whether Mr Lockwood, without consent, caused physical contact with Mr Knox and whether Mr Lockwood raised his fists while yelling at Mr Knox.

19 Mr Lockwood and Mr Knox each gave evidence and was cross-examined. Evidence relevant to this allegation was also given by others. What follows is, of necessity, only a summary of the evidence relevant to the decision in this matter.

The Evidence of Mr Lockwood

20 Mr Lockwood's evidence in chief was that late in the morning of 6 December 2012 he was in the staffroom and overheard Mr Knox, who was just outside, make a comment about 'false harmony'. This phrase has a particular significance: it had been used at the beginning of the year in a two-day professional learning session with the staff to refer to a workplace where, on the surface, people are 'getting along' but as they walk away and turn away from one another they will 'gossip and moan and groan' about each other in various ways.

21 Mr Lockwood was intrigued and interested why Mr Knox had made that comment and when he entered the staffroom, asked him what it was about. Mr Knox put his hand up and said: "I don't want to talk about this right now, Mr Lockwood. That was a comment between me and - and the other person". Mr Lockwood said that it was important that if Mr Knox had an issue around false harmony he wanted it 'brought to the table'; Mr Knox again declined.

22 Mr Lockwood spoke in a stern manner about it being 'very serious stuff' and 'we must talk about it'. Mr Knox walked out of the staffroom and Mr Lockwood followed to 'again invite him' to sit down and discuss the issue:

> "Why - come on, mate. We need to sit down and have a chat about this. Really, this is - this is - this is the very thing that we've been talking about for two years, that we must clear up. We can't just let it go." (t 347).

23 He said this in a stern manner, not in a jovial, friendly way. Mr Knox continued to walk away and Mr Lockwood returned to his office. He left his office perhaps 3-5 minutes later and as he did so he saw Mr Knox and again, in 'an authoritarian sort of stern manner' asked to discuss his issues around the area of false harmony. Mr Knox walked out on to the verandah and Mr Lockwood left it at that point. Mr Lockwood then walked out on to the verandah and saw Mr Knox just in the storeroom and thought he would 'give it one last try' and went across.

24 Mr Lockwood stood by the storeroom door deliberately to keep the door open because he was concerned at this stage that it was a fairly small space and had he gone in to the storeroom Mr Knox might be concerned about Mr Lockwood's physical proximity and his personal space. He again invited Mr Knox to talk about the issue and Mr Knox declined. The following exchange then occurred. Mr Lockwood said:

> "Look, Warren, I am really, absolutely tired of you saying one thing to my face and then turning around and saying another thing behind my back. My understanding was the - the issue around false harmony was one that was open and transparent and if there were issues around false harmony, that you, being the person that was keen and stood up in front of the staff about the issues that we had as a school, you would come to me and you would speak to me directly. Now I'm giving you that opportunity now and you're refusing to do that. And he said, 'Steve' - and I think these were his words, 'Keep a civil tongue in your head. I'm not going to talk about it now.' And at that point I said, 'Warren, I know what you said to the ERG [referring to the Expert Review Group which reviewed Nollamara Primary School following the school's NAPLAN results]'. And he said, 'You can't. That was confidential'."

25 Mr Lockwood's evidence is that he decided to 'let it go' and he stood back from the storeroom door. Mr Knox came out of the door and closed it. Mr Lockwood walked back to his office and Mr Knox walked away. In his office Mr Lockwood reflected again and wrote a letter to Mr Knox (Exhibit ED12). The letter referred to the staff agreeing to work hard to create a positive workplace culture and it was important he raised with Mr Knox the latter's comments to another staff member about the staff end-of-year celebrations and his words that 'it just creates false harmony', and wanted to discuss this at Mr Knox's earliest convenience.

26 Mr Lockwood said he did not at any point make physical contact with Mr Knox nor clench his fists at any point, but he believed he did do some finger pointing in the staffroom. He had not been provoked in any way.

27 In cross-examination Mr Lockwood agreed that he addressed Mr Knox in stern manner as soon as he came into the staffroom, or very soon thereafter. It was in Mr Lockwood's mind that Mr Knox was failing to respect his authority as the Principal. There was a 'pocket of resistance' among the staff at the school and Mr Knox was a part of the problem and was entrenched in that group. He only pursued Mr Knox and not the person with whom Mr Knox had been having the conversation. He engaged him twice more in a very stern manner. He denied that 'stern' or 'authoritarian' was code for 'yelling'. He denied deliberate toning down his behaviour when Ms K Phillips was there.

28 Mr Lockwood said that he realised that by saying that he knew what Mr Knox had said to the ERG it would surprise and upset Mr Knox; he would not have said it if he had been calm, collected and reflective, even though he thought he was 'still fairly calm'. The reasons Mr Lockwood decided to 'let it go' were a combination of Mr Knox's refusal to discuss the matter and Mr Lockwood having 'gone too far' with the ERG comment.

The Evidence of Mr Knox

29 Mr Knox says that when he entered the staffroom Mr Lockwood asked him something like: 'What's false harmony?' and he replied that he had been talking to a teacher about the article in School Matters. Mr Lockwood then went 'from zero to one hundred' saying words to the effect of "I'm sick and tired of getting lied to and I know what you said … about me in the ERG report". Mr Knox says he was taken aback and said, at some stage: "I'm not talking to you while you're yelling at me like that". He said Mr Lockwood's comment about knowing what Mr Knox had said to the ERG made Mr Knox quite angry and he said: "I'm not talking to you while you're speaking to me like that"

30 Mr Lockwood followed him through the staffroom door and Mr Knox refused to listen to him, saying: "I'm not going to speak to you while you're using that tone of voice, I'll talk to you when you're more civil". He thought Mr Lockwood went back to the office.

31 Mr Knox got the key to the arts storeroom and he next saw Mr Lockwood when he was walking down to the ramp across the quadrangle. Ms Phillips had joined him and Mr Lockwood came out of the doors and followed him down 'still ranting and raving'. Mr Lockwood stopped half way along.

32 A little later, Mr Knox, with Ms Phillips assisting him, pushed a trolley load of books to the library and unloaded them. Ms Phillips went to the office area and Mr Knox then returned the trolley to the arts storeroom. He was trying to pull the storeroom door towards him while also trying to pull out the key. His evidence is that:

> "Steve Lockwood came around then and started - he actually leaned over my shoulder and said, 'I'll do it'. And I was going, 'No, I was doing it. I'll do it, I'm fine'. But he was pushing, pushing. Now, at that moment I thought to myself, oh my God, I'm going to get pushed in here and yelled at given what he's just done cos I was still like in shock about being yelled at anyway. I thought oh my God I'm going to get pushed in here, my neck's really bad at the moment. And then I remember thinking to myself it's finally happened, I'm just wondering - I was wondering who it was going to happen to that he was finally going to have physical contact with - with the staff.
>
> Okay, describe the physical contact, if you would?---Well, he had his right arm over my back, he was fairly big and quite large and rotund in the stomach, so he's pushing me, he was going - he was attempting to get the key out from the door but at the same time he was pushing me into the doorway. And I had this horrible feeling that I was going to be in there alone with him, which was one of his tactics, get you alone, scream at you in your face, then you'd walk out and then everything's fine, you know, Mr Nice Guy the next day like nothing happened. But I was most concerned about my spine." (t 213)

33 Mr Knox said that he pulled the key out of the door and pulled it shut. Mr Lockwood had 'sort of stepped back at that moment' and Ms Phillips came around the corner. They walked back down the ramp towards the quadrangle and Mr Lockwood followed part of the way.

34 Mr Knox said that after the incident he was in shock. At lunchtime he did his lunch duty and then was sitting down in a small area with some other staff and while he was sitting there Mr Lockwood brought him an envelope with a letter in it (Exhibit ED12). He responded to the letter in the evening of the same day (Exhibit ED13), handing it to Mr Lockwood the next day. On that day he printed some union complaint forms 'because things were escalating with his behaviour and it actually turned out to be me but that - well, I feel I was assaulted'. He completed one and faxed it to the union.

35 Mr Knox has since been absent from work on the grounds of 'post-traumatic stress disorder from the years of verbal abuse and then the physical abuse that triggered that'. He claimed workers compensation and only recently returned to full time hours.

36 In cross-examination Mr Knox acknowledged that possibly Mr Lockwood had to raise with him the issue of Mr Knox using inappropriate language at meetings and in the tea room. Mr Knox stopped regularly attending morning tea and lunch. In meetings he would give his opinion. He probably has made general negative comments criticising the skill of the school administration.

37 Mr Knox said that Mr Lockwood had been 'trying to lean over to get the key' but then said that Mr Lockwood was saying he was leaning over to get the key out for him and pull the door shut because the key was not coming out, but Mr Lockwood was pushing him in there at the same time.

38 Mr Knox said that he had written his letter in response to Mr Lockwood's letter. He had used the words 'physical contact'. The union representative had said that any sort of bodily contact is assault, so he had used that word. He concedes that his letter reads as though there were two incidents (in both the office area and the storeroom) but that is incorrect because there had not been any contact in the office area. He had said the incident had been witnessed when he knows now that it had not been. He acknowledged that although he maintains Mr Lockwood yelled, he did not use that word in the letter. Neither did he refer to Mr Lockwood raising a fist, or mention his fear.

39 In relation to the email written by the union with his authority and knowledge (Exhibit L3) Mr Knox agreed it is misleading when it refers to the incident having been witnessed, and that the words 'previous conflict events' are not words he himself would have used. He uses the word 'fear' in this email.

40 Mr Knox recognised that he subsequently used different words to refer to the physical contact: in his email to the ERG he used the words 'verbally and physically assaulted me'; in his written complaint to the union he wrote 'physically pushed by a body in the office area … full body pushing at door' (Exhibit L4); he acknowledges he may have used the word 'attacked' to the Standards and Integrity Directorate and that it could indicate a deliberate or a more violent act. He does not recall saying to the Standards and Integrity Directorate that it felt like a love hug, saying in re-examination that he had never used, or heard, that term. He admitted his estimate of the duration of the incident of 30 or 40 seconds is possibly an exaggeration.

41 He said that if, at a professional development session at Weld Square Primary School he may have said: 'assaulted … punched me', that would be incorrect. He probably did say that Mr Lockwood had 'physically attacked' or 'assaulted' him but did not recall also saying: 'I'm not the only one'. He denied that he has a vendetta against Mr Lockwood and when he was asked whether he has said things which are exaggerated or a deliberate lie, he replied 'Not a deliberate lie, no, I have not. So I disagree'.

Other Evidence Before the Commission

42 A number of persons gave evidence which will be referred to subsequently where it has been found to be relevant. A number of documents were tendered in evidence; relevantly, these include letters, copies of emails, a summary and a transcript of the interviews of Mr Lockwood and a CD of the recordings of all of the interviews conducted by the Standards and Integrity Directorate in relation to all of the allegations.

The Investigation Report

43 The Standards and Integrity Directorate produced an Investigation Report on 27 June 2013, consisting of 139 pages and 13 attachments, which formed the basis for the Director General finding Mr Lockwood guilty of breaches of discipline and consequently imposing penalties on him. On 18 December 2013, immediately after the hearing of the two preliminary issues, the Director General provided a copy to the Commission. It was not tendered in evidence. During the course of this hearing, the parties were informed of my intention to have regard to it and they were given the opportunity of being heard in relation to it.

Consideration

44 It was submitted on behalf of Mr Lockwood that Mr Knox's evidence presents a number of issues which go to his credibility. For the following reasons I agree and I attach less weight to Mr Knox's later descriptions of what occurred. In his letter he used the words 'physical contact' however he subsequently has used words indicating a more serious event. Mr Knox says that he was told by the union that any physical contact is an assault and he appears to have been happy to use it, and the other words, from that point forward: 'assault', 'verbally and physically assaulted me', 'physically pushed by a body in the office area … full body pushing at door to art storeroom door' and 'physically attacked me' and a 'love hug'. As to this last description, Mr Knox's evidence that he had never used, or heard, the term love hug is incorrect: I have listened to the audio recording of his interview (Exhibit ED18) and he certainly did say '… it feels like it's a love hug or something…'.[1]

45 I accept the evidence of Ms Sullivan that on 10 June 2013 Mr Knox said to her at Weld Square Primary School that Mr Lockwood 'physically attacked me, triggering post traumatic stress disorder'.

46 Mr Chadd did not know the person whom he overheard say: 'At Nollamara my Principal assaulted me' and then: 'Yeah, he punched me' but Mr Knox admits that he has used the word assault and I accept Mr Chadd's evidence that he did.

47 These differing words show that Mr Knox has not been consistent in his description of the event. I consider that if what had happened is appropriately described as a 'physical attack' Mr Knox is more likely to have used words other than mere 'physical contact' in his letter.

48 Mr Knox's estimate of the duration of the incident, '30-40 seconds', was shown in cross-examination to be an exaggeration. I note too that the letter reads as though there were two incidents (office area and storeroom) when, as Mr Knox admitted in cross-examination, there was only one incident, saying 'grammatically it's the office area' where it happened. His letter is misleading in that regard.

49 It was submitted on behalf of Mr Lockwood that Mr Knox has a dislike of Mr Lockwood to such a degree that caution should be taken with his evidence in any event, that he has displayed a tendency to exaggerate, is an emotional person, was evasive under cross-examination and refused to admit he did not like Mr Lockwood. If there was no other evidence supportive of Mr Knox's evidence, that submission might carry greater force. However, although I give less weight to Mr Knox's later descriptions of what occurred, there is evidence supportive of much of Mr Knox's other evidence.

50 Mr Knox's evidence that Mr Lockwood spoke to him immediately when he entered the staffroom is consistent with Mr Lockwood's evidence, even though the exact words used between them differ. Mr Knox says that Mr Lockwood then went 'from zero to a hundred' which is consistent with Mr Lockwood's evidence in cross-examination that he used a stern and authoritative voice immediately when Mr Knox entered the staffroom, and that he had finger-pointed then, or after, Mr Knox's first refusal to discuss the matter at that time.

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[1] At 45:34 minutes: 'He had his hand over, trying to get to the thing, like, you feel like your…it feels like it's a love hug or something, do you know what I mean? It wasn't like right over bear hugging me or strangling me or anything but that's the size of him and down that side as he was trying to get to the handle as well.'

51 Mr Knox's evidence that Mr Lockwood told him he knew what Mr Knox had told the ERG is confirmed by Mr Lockwood, although Mr Knox says this happened in the initial staffroom incident and Mr Lockwood's evidence is that he said it later near the storeroom door.

52 Mr Knox's evidence that he responded to Mr Lockwood by saying words to the effect: 'I'm not talking to you while you're speaking to me like that' is confirmed in Mr Lockwood's evidence. Mr Knox's evidence that Mr Lockwood followed him through the staffroom door and Mr Knox refused to listen to him is confirmed by Mr Lockwood's evidence, again in cross-examination, that he followed Mr Knox for 8–10 metres when he walked away and engaged him twice more in a very stern manner.

53 Mr Knox's evidence is that he next saw Mr Lockwood when he was walking down to the ramp across the quadrangle and Mr Lockwood came out of the doors and followed him down 'still ranting and raving'; Mr Lockwood said that he left his office perhaps 3-5 minutes later and, as he did so, he saw Mr Knox and again in 'an authoritarian sort of stern manner' asked to discuss his issues around the area of false harmony. There is consistency in their evidence about the occasion even though they disagree about the words and the volume of Mr Lockwood's voice.

54 Also, some of Mr Knox's evidence is corroborated by other evidence before the Commission. Mr Knox's evidence that Ms Phillips was with him down to the ramp across the quadrangle when Mr Lockwood followed him down is corroborated by Ms Phillips. Her evidence is that as Mr Knox was walking out she saw Mr Lockwood following 'really close behind him' and yelling and that it was 'obviously confrontation'; Mr Lockwood's demeanour was very hostile and angry. Ms Phillips' evidence in this regard is corroborated by her note signed by her on 7 December 2012, which is not in evidence but is attachment 4 to the Investigation Report, that Mr Lockwood was 'using a loud voice that sounded very aggressive'.

55 This provides some credibility to Mr Knox's other evidence and I therefore do not give less weight to all of his evidence.

56 It was submitted on Mr Lockwood's behalf that his evidence was presented in a considered and honest manner and is credible, that he has consistently maintained that there was no physical contact, that he was prepared to admit that he does 'finger-point' and that he needs to address that issue. I find there is merit in the submission, however for the following reasons the evidence overall makes me cautious about giving greater weight to all of Mr Lockwood's evidence where it conflicts with other evidence.

57 Mr Lockwood's initial evidence that he was intrigued and interested in what Mr Knox had said, and spoke to him twice before speaking in a stern and authoritarian manner, is a milder description than his later evidence that he addressed Mr Knox in stern manner as soon as he came into the staffroom or very soon thereafter and that Mr Knox was failing to respect his authority as the Principal.

58 His denying deliberately toning down his behaviour when Ms Phillips was present is in contrast to Ms Phillips' evidence that she saw Mr Knox walk out and, as he was walking out, Mr Lockwood was following him and yelling. To her, there was obviously confrontation, Mr Lockwood was 'really close behind' Mr Knox, and Mr Lockwood's demeanour was very hostile, very angry and right into Mr Knox's space. She had said: 'Warren, I'm here' because she could hear Mr Lockwood's raised voice and when she did so then Mr Lockwood stopped.

59 I accept that Ms Phillips had a good relationship with Mr Knox, however I do not consider this is a reason not to accept her evidence. I regard Ms Phillips as relatively independent given that she had been nine years away from the school and had little to do with other staff there. She was complimentary about Mr Lockwood in cross-examination when there was no need for her to be, saying when he first came to the school she actually very much respected Mr Lockwood and liked him: 'You could ask him anything, he would do anything for you'. I generally accept her evidence.

60 In relation to whether Mr Lockwood yelled, it was pointed out that Mr Knox did not mention yelling in his letter written the same day. This is correct, but he did refer to Mr Lockwood's 'bullying tone of voice'. Mr Lockwood denied that his own description of his having spoken to Mr Knox in a 'very stern and somewhat authoritarian manner' is code for yelling, however, Ms Phillips maintained under cross-examination that Mr Lockwood was yelling when she saw him – she could hear Mr Lockwood raising his voice at him. She was reluctant to draw a distinction between a raised voice and yelling and, although acknowledging that 'it was a couple of years ago and she could not remember 100 per cent, said it was more yelling than a raised voice.

61 Further, Ms Phillips' evidence that she heard Mr Lockwood yelling is credible given the evidence that Mr Lockwood had yelled at Mr Knox on other occasions. Ms Bennett said she told investigators that she had heard Mr Lockwood yelling at Mr Knox, that Mr Knox would say to Mr Lockwood to 'back off'; to her, it was a personal space issue. I have considered the evidence, and the submission, that if Mr Lockwood had been yelling it would have echoed and been overheard. The balance of the evidence does not establish that it would have echoed and I prefer Ms Phillips' direct evidence of what she heard over Mr Lockwood's evidence.

62 Even though I find that Mr Lockwood was yelling when heard by Ms Phillips, I find that Mr Lockwood was not yelling on each of the occasions he spoke to Mr Knox: Ms Stephens' evidence is that when she was walking up the verandah and saw Mr Knox walking ahead of Mr Lockwood, there was definitely no screaming or yelling, or even finger-pointing. I accept Mr Lockwood's evidence that when he followed Mr Knox from the staffroom he did so to 'again invite him' to sit down and discuss the issue - it is supported by Ms Stephens who heard Mr Lockwood saying, "Oh, come on, mate. Come on, mate. Come on, mate". Mr Lockwood himself admits that he was not being jovial or friendly when he was saying it but I conclude he was not yelling.

63 I consider Mr Lockwood's evidence that at the storeroom door he addressed Mr Knox by again giving the invitation to him to talk about the issue is a mild description of his actual manner towards Mr Knox. Both Mr Lockwood and Mr Knox agree that Mr Knox asked Mr Lockwood to 'keep a civil tongue in your head' from which I conclude that Mr Lockwood was not doing so. Also it was at this point that Mr Lockwood says that he made the comment to Mr Knox about knowing what Mr Knox had

said to the ERG, doing so to surprise and upset Mr Knox, and acknowledging that he would not have said it if he had been calm, collected and reflective. I do not accept that he was still 'fairly calm' as he said that he was.

64 In relation to the allegation that Mr Lockwood raised his fists, Mr Knox stated in the hearing that Mr Lockwood did not raise his fists. Mr Lockwood denied that he did so and on the evidence I find that he did not do so.

65 In relation to the issue of whether or not there was physical contact, given the nature and seriousness of this part of the allegation, I apply the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Mr Knox's evidence that physical contact occurred is flatly denied by Mr Lockwood. He has consistently denied that any physical contact occurred. His evidence is that he stood by the door to deliberately keep it open and he put his foot against it to keep it ajar because:

> I - I was concerned at this stage that, had I gone in there - it was a fairly small space - and that he - he might, you know, be a bit concerned about the - the physical proximity of me and personal space and, you know, those sorts of - those sorts of issues.

66 Mr Lockwood's stated concern that Mr Knox might be concerned about Mr Lockwood's physical proximity and his personal space does not sit comfortably with his acknowledgement that Mr Knox may have felt threatened by his behaviour, even though that was not his intention; if he did have that concern, he would have made sure that he did not do anything to cause Mr Knox to feel threatened. Also, Ms Phillips' evidence shows that at least on the occasion to which she refers, Mr Lockwood did not show concern for Mr Knox's personal space and Ms Bennett's evidence is that Mr Knox would say to Mr Lockwood to 'back off' and that to her, it was a personal space issue.

67 Moreover, as I have found, Mr Lockwood was maintaining his earlier manner towards Mr Knox in that he was not keeping a civil tongue in his head and, on his own evidence, wanted to surprise and upset Mr Knox by his ERG comment and was not calm, collected and reflective. I do not give weight to Mr Lockwood's evidence of his concern at the storeroom door about Mr Knox's personal space.

68 In contrast, the evidence of Mr Knox that body contact did occur, and that afterwards he felt shocked, is rendered more likely by the evidence of Ms Phillips, who saw Mr Knox immediately after he returned from the storeroom. She described Mr Knox as 'visually shaken and white' and quite upset, and that he told her he and Mr Lockwood had had a bit of a confrontation and Mr Lockwood pushed him. I do not overlook that Ms Phillips' evidence included that she was having a bit of a memory problem, but she gave her evidence clearly enough on this point, and I accept it.

69 It is evidence which is consistent with the evidence of Ms Bennett who saw Mr Knox after the alleged incident and said that he was very distraught; she had never seen him like this before. She recalled Mr Knox saying that Mr Lockwood had pushed him with both hands in the chest, and even though I am satisfied that pushing did not occur as she recalls, her evidence that she had never seen Mr Knox like this before remains.

70 There is evidence that in the past Mr Lockwood had yelled at Mr Knox a lot, and even that they both used to yell at each other. I conclude that what occurred at the storeroom door was more than what may have occurred between him and Mr Lockwood in the past. If yelling was all that had occurred at the storeroom door, I think it more likely that Mr Knox would not have had the reaction which he did have: Ms Phillips' evidence is that even though Mr Knox is an emotional person, things don't usually bother Mr Knox, and if they do, he copes. However, she said that on this occasion Mr Knox was just such a mess, he just sat there just shaking and that this is not common for him.

71 Further, Mr Knox printed union complaint forms and submitted one to the union, and there is no evidence that he had done such a thing before in relation to any past event between him and Mr Lockwood. He made a workers compensation claim when he had not previously made a workers compensation claim in his approximately 30 years with the Education Department, even though on one earlier occasion he had injured his wrist. After a further day, Mr Knox then was off work and has not returned to the school.

72 Therefore, I find the fact that Mr Knox did refer to 'physical contact' in his letter written in the evening of that day is significant, as is the context of those words: 'I did not appreciate your heavy handed bullying and body language and your bullying tone of voice…'. The letter is contemporaneous with the event and for that reason more reliable and, together with the evidence of others referred to above, leads me to conclude that those words are not a deliberate lie even though Mr Knox subsequently has used descriptions for the physical contact which go beyond the words he used in the letter. Further, Mr Knox has consistently maintained that physical contact occurred even though he has, in my conclusion, used words in later descriptions indicating a more serious event.

73 Mr Knox's evidence that Mr Lockwood leaned over his shoulder saying 'I'll do it' seems to me quite likely if Mr Knox was having difficulty removing the key from the door. Mr Lockwood's evidence in chief does not refer to the key in the lock being stiff or that he was trying to assist Mr Knox and does not directly conflict with Mr Knox on this point. Mr Knox's evidence on this point was not broken down in cross-examination. I am not persuaded that Mr Knox's description of the incident at the storeroom is implausible as it was submitted to be on behalf of Mr Lockwood.

74 I accept that Mr Lockwood believes that no physical contact occurred. His evidence on this point was not broken down in cross-examination. The credibility of Mr Knox's evidence on whether physical contact occurred was sought to be undermined by pointing out that he drove home after the event and came to work the next day. However, I am persuaded by the balance of the evidence of others referred to earlier of the effect on Mr Knox immediately after the encounter, his mentioning it in his letter and his later absence from the school following the event, that Mr Knox's evidence on this point is credible.

75 Dixon J in *Briginshaw* at 362 said:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

76 The allegation of physical contact raises a serious issue however it does not seem to me to be unlikely that in the relatively small physical environment of the storeroom doorway some physical contact may have occurred. I have before me direct evidence of it having occurred. I find it was minor physical contact which naturally occurred in the course of Mr Lockwood attempting to remove the key from the door. That was Mr Knox's evidence of what Mr Lockwood was saying he was doing, and I find there was no deliberate intention on Mr Lockwood's part to have come into physical contact with Mr Knox; the reasons Mr Knox gave for his fear arising from the physical contact do not, in my view, describe the reason why the physical contact occurred. If the events preceding it had not occurred I suspect any physical contact while Mr Lockwood was assisting Mr Knox to remove the key from the door would have been unremarkable.

Conclusion

77 I agree with the submission of the Director General that allegation 2 is essentially a course of conduct by Mr Lockwood towards Mr Knox. What was assessed by the Director General was more than just whether there had been physical contact or whether Mr Lockwood raised his fists while yelling at Mr Knox. Mr Lockwood was in the position of school Principal and in that position he is expected to maintain an appropriate standard of behaviour.

78 I find from the evidence that Mr Lockwood did not raise his fists when addressing Mr Knox. I do find that he yelled, even though he did not do so on each occasion on that day, and that some minor physical contact occurred at the storeroom door.

79 I add that even if I am wrong in finding that some minor physical contact occurred, the evidence nevertheless does establish a course of conduct much as the Director General submitted: Mr Lockwood confronted Mr Knox in a stern manner when all that had happened was that he had overheard the words 'false harmony', he challenged Mr Knox about the words when he did not know their context; he spoke to Mr Knox in a very stern and somewhat authoritarian manner when there was nothing to warrant it at that stage and pursued Mr Knox out of the staffroom even though Mr Knox had said that he didn't wish to speak about it 'at this time'; he went back to Mr Knox on two further occasions when Mr Knox was making it clear that he did not wish to speak about it at that time, maintaining a very stern and somewhat authoritarian manner with Mr Knox throughout the day, yelling on at least one occasion, finger-pointing and telling an untruth to Mr Knox in order to surprise and upset him.

80 Mr Lockwood displayed behaviour towards Mr Knox that he found threatening even though it did not include raising his fists while yelling at him. He caused Mr Knox sufficient distress for it to be noticed by others. Mr Knox did not conduct himself in a manner which would provoke that behaviour.

The Code of Conduct

81 The Department of Education Code of Conduct section 1 Personal Behaviour provides as follows:

> **1. Personal Behaviour**
>
> As employees of the Department we behave with integrity in all personal conduct and treat all others with due consideration.
>
> Employees are expected at all times to behave ethically and act with integrity. In practice, this means employees:
>
> - treat others with respect, dignity, courtesy, honesty and fairness and with proper regard for their rights, safety and welfare;
> - make decisions fairly, impartially and promptly, having regard to all relevant information, legislation, policies and procedures;
> - contribute to a workplace that is free of harassment, bullying or discrimination against colleagues, students or members of the public;
> - encourage positive work habits, behaviour and personal and professional workplace relationships and boundaries;
> - do not engage in behaviour that may bring your own reputation or that of the Department and the Public Sector into disrepute; and
> - do not tolerate or participate in behaviour that is inconsistent with these principles.

82 I find that Mr Lockwood's behaviour breached the Code of Conduct in the following ways. On more than one occasion during the day Mr Lockwood did not treat Mr Knox with respect in his tone of voice, nor with dignity when he followed Mr Knox closely, nor with courtesy when he finger-pointed. He was not truthful to Mr Knox when he made the ERG comment. In doing so, he contributed to a workplace that was not free of harassment towards a colleague. His manner did not encourage positive behaviour and professional workplace relationships even though he was pursuing those goals.

83 As Principal of the school, he should set an example to all staff and should not tolerate or participate in behaviour that is inconsistent with those principles of personal behaviour.

Penalty – Allegation 2

84 The Director General had imposed both disciplinary action and improvement action pursuant to s 82A(3)(b) of the PSMA on Mr Lockwood in relation to this allegation. The improvement action including counselling and performance management for a 12 month period have now occurred and are agreed to be moot. It is the disciplinary action of a reprimand imposed by the Director General which Mr Lockwood challenges in this application.

85 The Director General submits that there is ample evidence upon which to conclude that Mr Lockwood breached the Code of Conduct on 6 December 2012 and that a reprimand is the appropriate penalty.

86 On behalf of Mr Lockwood, reference is made to his work history. Mr Lockwood has been in his current Deputy Principal position for 24 years. He has a Bachelor of Arts and Education and also a Bachelor of Education. He is a JP. In 1986 he had served on the first Magistrates bench in Nullagine. He commenced his career teaching in the Pilbara, became acting Principal

in Nullagine Primary School in 1996, Principal at Dawul Remote Community School in the Kimberley and Yandeyarra and then Cassia Primary Schools as the Principal for six months in an acting capacity at a high level. He acted at South Hedland Primary School at a level 5 Principal position and then to Port Hedland Primary School as a substantive level 5 Principal for three years. He came to Perth on a voluntary retrogression to level 4 to move back to the metropolitan area for personal reasons. He and the staff at Nollamara Primary School were commended by the Department of Child Protection in relation to the management of a particular student. The school has been noted in School Matters for exceptional behaviour management work. He had received training around the positive management of students.

87 The PSMA in s 80A defines disciplinary action in relation to a breach of discipline by an employee, means any one or more of the following —

(a) a reprimand;

(b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;

(c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;

(d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;

(e) reduction in the monetary remuneration of the employee;

(f) reduction in the level of classification of the employee;

(g) dismissal;

88 Mr Lockwood's breach of the Code of Conduct is in my view at the lower end of the scale, particularly as I have found that the physical contact which occurred was minor and resulted from his endeavouring to assist in the removal of a key in a relatively small space. I take into account his long work history and the absence of any prior such misconduct, including the evidence that Mr Lockwood has been respected and liked during some of his time at Nollamara Primary School.

89 Mr Lockwood's breach of the Code of Conduct warrants disciplinary action and in the context of his work history a reprimand is appropriate.

The Order to Issue

90 A minute of an order now issues quashing the Director General's finding that Mr Lockwood committed a breach of discipline and the penalty in respect of allegation 4 and that a reprimand in respect of allegation 2 is appropriate.

2014 WAIRC 01197

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2014 WAIRC 01197
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 5 JUNE 2014, MONDAY, 11 AUGUST 2014, TUESDAY, 12 AUGUST 2014, WEDNESDAY, 13 AUGUST 2014, THURSDAY, 14 AUGUST 2014, FRIDAY, 15 AUGUST 2014
DELIVERED	**:**	FRIDAY, 24 OCTOBER 2014
FILE NO.	**:**	APPL 52 OF 2013
BETWEEN	**:**	STEVEN LOCKWOOD Applicant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

Result	**:**	Findings and penalties in allegation 4 quashed Reprimand appropriate in allegation 2
Representation:		
Counsel:		
Applicant	**:**	Ms S Holmes, of counsel (by correspondence)
Respondent	**:**	Mr D Matthews, of counsel (by correspondence)
Solicitors:		
Applicant	**:**	Jackson McDonald
Respondent	**:**	State Solicitor's Office

Supplementary Reasons for Decision

1 A minute of an order issued quashing the Director General's finding that Mr Lockwood committed a breach of discipline and the penalty in respect of allegation 4 and that a reprimand in respect of allegation 2 is appropriate. At the speaking to the minutes, Mr Lockwood sought the following amendment to the proposed order 1:

> "That the findings of the Director General, Department of Education that Mr Lockwood committed a breach of discipline, and the penalties, in respect of allegation 4 are quashed."

2 The amendment is sought because the Director General imposed multiple penalties for allegation 4, namely:

1. Improvement action including counselling and performance management for a period 12 months (now completed);
2. Online training (Accountable and Ethical Decision Making and Classroom Management in Schools) (now completed);
3. A reprimand;
4. A fine of one day's pay; and
5. A transfer.

3 Mr Lockwood seeks a further order that the Director General be directed to reimburse him an amount equal to one day's pay which he was required to pay to the Department in respect of allegation 4 which is said to have been $470.10.

4 No request to speak to the minutes was received from the Director General and the Commission was advised that she does not wish to respond to the suggested amendment to Order 1 or to the new proposed order.

5 I found at [14] that Mr Lockwood's application regarding allegation 4 is made out. The consequence of such a finding was raised by me in the course of the hearing a t 403 where I observed that, putting to one side the improvement action, the online training and the transfer, all of which are common to the other allegations, the reprimand and the fine in relation to allegation 4 should be formally removed. To give effect to my finding, any penalty which was imposed in respect of allegation 4 should be quashed. In my view the amendment should be granted.

6 With regard to the further order sought, in my view this necessarily arises from the effect of the amended order, which would appear to be the following.

7 The findings of the Director General and the penalties are set out in the letters to Mr Lockwood of 5 July and 2 August 2013 (ED1 and ED2). The letters show that the Director General found four breaches of discipline. Items 1 and 2 were imposed generally, that is to say that they were imposed as a consequence of all four breaches found. The order to issue can have no practical consequence on these items for that reason and because, as the submission on behalf of Mr Lockwood shows, they have been completed; the order to issue cannot undo the improvement action and online training which has already occurred. Moreover, as items 1 and 2 were imposed generally, the improvement action and online training will remain valid in respect of the other allegations.

8 In relation to item 3, the letters show that a reprimand was imposed in respect of each allegation found. The amended order will quash the reprimand given in respect of allegation 4 and no further order is necessary to give practical effect to this.

9 In relation to item 4, the letters show that a fine of one day's pay was imposed in respect of allegation 4. The order to issue will quash that fine. The consequence of this is that Mr Lockwood is to be reimbursed for the amount of that fine which he has paid and the further order merely gives practical effect to the amended order.

10 In relation item 5, the letters show that the transfer to another school was imposed in respect of allegations 1, 3 and 4. The amended order will quash the transfer in respect of allegation 4 and no further order is necessary to give practical effect to this. The transfer will remain in respect of allegations 1 and 3.

11 For those reasons, the further order sought will give practical effect to the quashing of the fine in respect of allegation 4. The order now issues with the amendment and the further order requested.

2014 WAIRC 01198

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN LOCKWOOD
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 24 OCTOBER 2014
FILE NO/S	APPL 52 OF 2013
CITATION NO.	2014 WAIRC 01198

Result	*Findings and penalties in allegation 4 quashed*
	Reprimand appropriate in allegation 2
Representation	
Applicant	Mr J Raftos, of counsel and later, Ms S Holmes, of counsel
Respondent	Mr D Matthews and Ms C Brandstater, both of counsel

Order

HAVING HEARD Mr J Raftos, of counsel and later, Ms S Holmes, of counsel on behalf of the applicant and Mr D Matthews and Ms C Brandstater, both of counsel on behalf of the respondent;

NOW I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* hereby order –

(1) THAT the findings of the Director General, Department of Education that Mr Lockwood committed a breach of discipline, and the penalties, in respect of allegation 4 are quashed.

(2) THAT the Director General, Department of Education reimburse Mr Lockwood $470.10 being one day's pay which he paid to the Department of Education in respect of allegation 4.

(3) THAT a reprimand is the appropriate disciplinary action in respect of allegation 2.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2014 WAIRC 01186

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SITTING AS THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2014 WAIRC 01186
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 23 SEPTEMBER 2014
DELIVERED	**:**	WEDNESDAY, 22 OCTOBER 2014
FILE NO.	**:**	OSHT 2 OF 2014
BETWEEN	**:**	SOUTHERN GOLF PTY LTD TRADING AS SANCTUARY GOLF RESORT PTY LTD
		Applicant
		AND
		LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPT OF COMMERCE
		Respondent

CatchWords	**:**	Further review of WorkSafe Western Australia Commissioner's decision - Working on powered mobile plant without operator protective devices - Recreation industry - Prohibition Notice affirmed with modification - *Occupational Safety and Health Act 1984* (WA) - s 3, s 19, s 49, s 51, s 51A(5)(b), *Occupational Safety and Health Regulations 1996* (WA) reg 4.44(1)(a)
Legislation	**:**	*Occupational Safety and Health Act 1984* (WA),
		Occupational Safety and Heath Regulations 1996 (WA)
Result	**:**	Prohibition Notice 90005929 upheld with modification
Representation		
Applicant	**:**	Mr R Miguel
Respondent	**:**	Mr T Bishop

Case(s) referred to in reasons:

Tsintris v Roads and Traffic Authority of New South Wales (1991) 25 NSWLR 69

Wayne Vigar Sheetmetal v WorkSafe Western Australia Commissioner [2005] 2005 WAIRC 01869; (2005) 85 WAIG 2068

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1991) 72 WAIG 477

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1992) 74 WAIG 2

Case(s) also cited:

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) HCA 47

Perkins (WA) Pty Ltd v WorkSafe Western Australia Commissioner [2005] WAIRC 02820; (2005) 85 WAIG 3886

Reasons for Decision

1 Southern Golf Pty Ltd trading as the Sanctuary Golf Resort (the Sanctuary) (the applicant) filed an application on 3 September 2014 under s 51A of the *Occupational Safety and Health Act 1984* (WA) (the Act) seeking a further review of the decision by the WorkSafe Western Australia Commissioner (the respondent) relating to a review of prohibition notice 90005929 dated 27 August 2014.

2 The employer requested the Occupational Safety and Health Tribunal (the Tribunal) revoke the prohibition notice 90005929 affirmed by the WorkSafe Western Australia Commissioner pursuant to s 51 of the Act.

Background

3 The notice, to which this s 51A review relates was issued by Inspector Foot, an inspector with the respondent, and was issued on 21 August 2014 (exhibit Sanctuary 1). It is the Tribunal's understanding that Inspector Foot had formed the opinion that the employer was engaged in an activity:

> that involves or will involve the risk of imminent and serious injury or harm to the health of a person.

4 Inspector Foot's opinion had been formed in relation to the risk associated with the use at the applicant's workplace of the Toro Workman MD (Toro) without roll over protective structures (ROPS) and without seatbelts. The applicant has two Toros in use at the workplace.

5 The prohibition notice involved a contravention of the *Occupational Safety and Health Regulations 1996* (WA) (the Regulations) in particular reg 4.44(1)(a).

6 Following the initial issuance of the prohibition notice the employer on 27 August 2014 sought a s 51 review under the Act by the WorkSafe Western Australia Commissioner, Mr Lex McCulloch.

7 Following his review the Commissioner wrote to the employer, advising of the outcome:

> Rob Miguel
>
> Manager
>
> Sanctuary Golf Pty Ltd
>
> PO Box 7008
>
> EATON WA 6232
>
> Email: gm@sanctuaryresort.com.au
>
> Dear Mr Miguel
>
> REVIEW OF PROHIBITION NOTICE NO. 90005929
>
> I refer to your request of 21 August 2014 for a review of the above prohibition notice, in accordance with section 51 of the *Occupational Safety and Health Act 1984.*
>
> I have considered the circumstances in which the notice was issued and taken into account your submission.
>
> Prohibition notices are issued where an inspector has formed the opinion that there is an activity that involves or will involve the risk of imminent and serious injury or harm to the health of a person. Therefore, my review has focussed on whether Inspector Foot had grounds for forming the opinion there that there is such a risk in relation to the use of the Toro Workman MD without a roll-over protective structure and a seat belt.
>
> I consider that the risk of all terrain type vehicles overturning is well known, even at low speed and on flat ground. I do not consider the lack of incidents to date to be a compelling reason for not installing a roll-over protective structure when the consequences of a roll-over could potentially be fatal. The well established principles of risk management identify that, where the consequence of any injury or harm to health could be catastrophic, for example a fatality, then there is clearly a need to implement control measures.
>
> Further to this, the manual for the Toro Workman MD clearly identifies the potential for it to roll-over. For example, it states that "failure to operate the vehicle safely may result in an accident, tip over of the vehicle, and serious injury or death. Drive carefully". It recommends that the operate use "extreme" or "extra" caution in various situations including wet conditions to prevent tipping or loss of control.
>
> In relation to the types of control measures to implement, it is also a well recognised safety and health principle that, where there is a serious risk of injury or harm, a control measures that eliminate the risks or reduce the risks through engineering controls (such as installation of a roll-over protective device and seatbelt) offer a higher level of protection than ones that rely on the employee following safe work instructions.
>
> In relation to the practicability of installing the roll-over protective device, I am informed that the supplier of the Toro Workman MD supplies a bolt on protective device and it is readily available.
>
> In view of the above, I have decided to affirm the notice.
>
> For your information, regulation 4.44(1)(a) of the *Occupational Safety and Health Regulations 1996* specifically requires that mobile plant have operative protective devices, as far as practicable, if there any risk that they could overturn. Refer to the attached extract showing the regulation.

You are directed to display a copy of this letter and the notice it affects in a prominent place at any workplace affected by the notice.

For your information, you have the right to refer my decision to the Occupational Safety and Health Tribunal for further review. A request for this may be made using the prescribed form within seven days of the issue of this letter. The OSH Tribunal may be contacted on 94204444.

Yours sincerely

Lex McCulloch

WorkSafe Western Australia Commissioner

27 August 2014

Applicant's Submissions

8 Mr Rob Miguel, General Manager submitted the applicant had been in operation for 20 years. Their primary concern during that time is ensuring the provision of a safe working environment as part of the genuine interest in the operation of the resort. The ground keeping team is made up of a selection of employees who have been employed for a variety of years, two of whom have completed apprenticeships with the applicant. The applicant submitted that the employees' safety and wellbeing was their main concern, and the organisation was proud of the applicant's excellent safety record.

9 The applicant submitted the capabilities of the Toro do not pose a risk to operators:

> I believe that the notice was made – I'm certain was well meaning but I do believe in this particular instance that it's perhaps overzealous and certainly over cautious.
>
> (ts 4)

10 The applicant submitted that ROPS were not installed on the Toros as they were unnecessary due to the specifications of the vehicle. The way in which the vehicles operated made the use of the seatbelts, in the view of the applicant, impracticable.

11 The applicant submitted that the tyre width of 30 centimetres added to the stability of the Toro, making the risk of roll over virtually nil. A series of exhibits were submitted by the applicant. A copy of the prohibition notice 90005929 as issued by Inspector Foot of WorkSafe on 21 August 2014 against the applicant (exhibit Sanctuary 1) was provided to the Commission. The applicant then submitted three black and white photos of the Toro (exhibit Sanctuary 2). A series of eight photographs of the Toro series utility vehicles identifying a range of vehicles as provided by the Toro manufacturing group (exhibit Sanctuary 4). Finally, the respondent provided the Toro operator's manual, form number 3360-776 revision A (exhibit WorkSafe 1). Counsel for WorkSafe advised that it was this manual the respondent considered when reviewing the prohibition notice pursuant to s 51.

12 In response to a question from the Tribunal, Mr Miguel submitted he would be seeking to have the prohibition notice revoked so that the applicant would be able to continue to use the two Toros at the workplace:

> MIGUEL MR: No, we – we haven't been able to use the vehicles since the notice was served and obviously it's affecting our operation. And we don't believe that there is a need for that – for the – for the course of action that was – was required under the prohibition notice.
>
> …
>
> MIGUEL MR: We don't believe the vehicles are such that they require to have a roll-over protection. And secondly, that the – the role of the vehicle and the duties that they undertake, you know, make having to wear a seatbelt impracticable and – and not really feasible.
>
> MAYMAN C**:** All right. So in your view, there's no action required if the prohibition notice was lifted?
>
> No, I don't believe so.
>
> (ts 7)

13 The applicant submitted a series of eight photographs reflecting the terrain of the golf course which Mr Miguel submitted to be, compared to other golf courses, relatively flat (exhibit Sanctuary 4).

14 The applicant submitted that ROPS were not fitted on the Toro because the specifications and limitations of the vehicle made them unnecessary. The purpose of the operation of the vehicle on the golf course made the use of the seatbelts which was essential to the requirements of the prohibition notice were simply not practicable. The type of tasks that the staff undertook in using the Toro included repairing divots in and around tees and along fairways, picking up rubbish and sticks after damage or any other cause, which could be a matter requiring a worker to alight from the vehicle as little as five to ten metres apart. Employees undertake sandbank bunker maintenance, which again required employees to drive from one bunker to another, raking, picking up pieces and repairing bunkers which can be as little as ten metres apart sometimes up to 50 or 100 metres apart. Additionally, the Toro is used for irrigation maintenance, as there are 2,000 sprinklers on the golf course. These sprinklers can be as close as 25 metres apart and they need to be regularly serviced and checked which, for the employee, means getting in and out of the Toro frequently. The vehicle is also used for other matters such as emptying rubbish bins, which involves one bin to each hole on the 18 hole golf course. The Toro is used to transport general tools, for course maintenance, work on the practice range and general course marshalling, as well as general course renovations. This requires employees to constantly board and alight the Toro. It is the applicant's view that the practicability of an operator to be expected to use a seatbelt every time the operator accesses the vehicle. This in the applicant's view is impracticable.

15 Mr Evan Goulis gave evidence as the National Service Manager for Toro Australia. Mr Goulis primarily looks after service centres regarding the vehicles and provides technical support in distributing the Toro vehicles. Mr Goulis gave evidence that

this particular vehicle is a two-wheel drive vehicle, which means there are limitations as to where the vehicle can actually travel. Unlike a four-wheel drive vehicle, a two-wheel drive vehicle is limited by virtue of speed. The Toro vehicles in the applicant's operation are required to limit their speed down to approximately 18 kilometres per hour, but as a standard these vehicles can operate up to about 26 kilometres per hour. Mr Goulis gave evidence that the vehicle has a much lower ground clearance at the front, seemingly, about 24.5 centimetres, and at the rear about 18 centimetres, and at the centre the vehicle has a system which twists as it goes over undulating terrain to ensure that all four wheels stay in contact with the ground. This, in the view of the witness, adds to ride quality, but also maintains contact with the ground. The witness indicated approximately 120 to 150 of these vehicles have been sold in Western Australia by Toro, which excludes other manufacturers. The witness gave evidence that in his knowledge there had been no roll over situations in the eight years he had been with the company. He did acknowledge there was a detailed section in the operators' manual relating to roll over warnings. In response, the witness said:

> Those warnings are fairly similar across all manufacturers. I have an example of a – of a John Deere Gator here, which is a similar vehicle to ours, which has similar warnings about the potential of – of rollover. You can't mitigate all risk, it depends on who the operator is and how they're trained as well. But the – the warnings are there across the industry in all – in all manuals. I suppose similar to – to a motor car vehicle, they're – they're capable of doing well over the speed limit but they're still advertised as being able to go up to a certain speed.
>
> (ts 12)

16 The witness gave evidence that the Toro is capable, from a manufacturer's point of view, of being fitted with ROPS and seatbelts, and they are provided as a kit. For the purposes of installation the bolts for ROPS and seatbelts are already on the Toro when it is purchased. The witness gave evidence that the cost for such an accessory is approximately $1,500 at today's price with additional cost for labour. Mr Goulis gave evidence that generally they do not get asked to put ROPS on Toro's prior to delivery.

17 In cross-examination, counsel for the respondent asked the witness to read from page 5 of exhibit WorkSafe 1, the operator's manual and the series of dot points in the left-hand column. The first dot point specified the operator and the passenger should remain seated whenever the vehicle is in motion. The witness was asked whether he accepted the proposition that the driver should keep his hands on the steering wheel and the passenger should use the hand-holds provided. Mr Goulis accepted the proposition.

18 The fourth dot point down on that same page reads:

> Failure to operate the vehicle safely may result in an accident, a tip over of the vehicle, and serious injury or death. Drive carefully. To prevent tipping and loss of control:
>
> (exhibit WorkSafe 1)

19 The applicant raised, in the context of serious and imminent risk that there had to be an issue hanging over one's head and that in order for something to be 'imminent' it had to happen shortly. The applicant in his submissions disputed that to be the case. The applicant also raised the issue of there having to be more than a mere possibility and submitted that that was all there was on this occasion. The applicant submitted that in relation to the operator of the Toro that anything was possible however the operators did have to take some responsibility and care in the work they do. The employees operated the Toro safely and the applicant submitted that he did not believe there was more than a mere possibility of any serious accident or roll over.

20 The applicant did not consider it fair to compare a golf course to other industries submitting it was important to remember that the vehicles used at the Sanctuary are different particularly in relation to the specifications of the Toro. The Toro has a low-centred point of gravity, a twisting pivot joint which retains all four wheels on the ground and makes it far more difficult for a roll over or anything unforeseen to occur. The applicant submitted that to be the main difference between the Toro and other side-by-side vehicles indicating it was not possible to compare them for example with the possibility of injury at the Sanctuary to an example where workers were exposed to an unprotected caustic pit of soda, the example raised by the respondent. The applicant considered this to be unreasonable and unrealistic.

21 In relation to the respondent's submission suggesting that the prohibition notice would not set a precedent the applicant considers that the environment in which the Toro operates is a particularly safe environment and whilst there are some undulations at the Sanctuary as there are with all golf courses the Sanctuary is safer than most other courses. For 20 years these types of vehicles have been operating without incident which, in the applicant's view, is evidence enough that there is no need for the type of prohibition notice as issued by the respondent. The Toro should be able to continue to operate as they are without ROPS and without seat belts.

22 In conclusion Mr Miguel indicated that that he would welcome the opportunity for the Tribunal to inspect the Sanctuary prior to the Reasons for Decision being issued. Arrangements were made for inspections to take place at the resort at 11.00 am on 1 October 2014. The particular purpose of the inspection was to enable the Tribunal together with the applicant and the respondent to gain a better perspective of the actual terrain of the Sanctuary.

Respondent's Submissions

23 Mr Bevan Ian Foot gave evidence for the respondent. The witness works as an inspector for WorkSafe based in Bunbury in the regional and primary industries team. As such the witness gave evidence he covers all sections of the Act. The witness' specialty is primary industries, in particular forestry and agriculture. The inspector is associated with forestry on a full-time basis and since 2011 has been associated with workplace fatalities.

24 The witness gave evidence that prohibition notice 90005929 was served on the applicant (exhibit Sanctuary one) on 21 August 2014. This was not the first time that the witness had visited the Sanctuary. Not only does the inspector visit the golf course in his capacity as an inspector he also regularly plays on the golf course. The witness gave evidence that the Sanctuary was a new golf course when he returned to Bunbury some 20 years ago and he has often played golf on the course.

The witness was asked to examine exhibit Sanctuary 4, (namely eight photographs) and asked if, in his view, the photos reflected the terrain of the golf course. In answer to the question the inspector indicated the photos did not reflect the true layout of the course in that they did not reflect the actual slopes and undulations in the golf course:

> In some areas the drop offs are quite steep slopes. In – in certain parts of the course even though it appears that when you're sort of walking down it to be flat, there are the undulations and – and of course there's a lot of bunkers and there's a lot of water and the drop offs to the water are at – in places, quite steep.
>
> (ts 27)

The inspector gave evidence that there were 78 bunkers as the advertising for the golf course spoke of the number of bunkers. The witness gave evidence that the golf course was made up of four actual waterways which interconnect the golf course. Further there was undulation at the course. For example:

> The – the fifth hole which is a par 4 that goes to the left, it's actually rated the hardest hole in the golf course, both sides there is a definite slope to the water. It's quite frustrating when you play golf because slightly to the left or slightly right even though it's a good hit, the slope of the actual fairways puts you in the water and then as you approach it, the actual green, there is a – a – where the actual green is on the north side of that there is a – a very steep slope into the water.
>
> (ts 28)

The witness described similar falls on the 13th fairway up to the 13th green on the 14th tee and spoke of a drop off and a steep walk down between the 16th and 17th holes.

25 The witness described when he first saw the Toro being used at the course it was about 5.20 pm on 20 August 2014. The witness had finished work for the day and was at the golf range hitting some range balls in a private capacity when the witness noticed a Toro on the left-hand side moving towards the right across the bottom of the driving range. The witness described himself as being at the end of the driving range near the clubhouse, the area where he was practising. The Toro came from the left and was heading towards the right. There was a young man and as he got off the Toro he was picking up golf balls in the wet area. At that time the employees were going around picking up all the golf balls before the applicant closed up for the night. From where the witness could see the tyre where the driver of the Toro got off the machine was slightly down towards the water's edge:

> So from my angle looking at the machine, it was sort of like looking over the right wheel to the left wheel it was slightly down on the left wheel and – and – and that's what – well, what – well, two things; first of all the fact that he shouldn't have been there because, um, I actually stopped hitting golf balls because he – he was in my firing range and the fact that I looked at it and I thought, 'that's got no ROPS on it', and that – I stopped being the golfer and I became the WorkSafe inspector.
>
> (ts 29)

26 The witness gave evidence based on his opinion and his experience with machinery he considered there to be a risk to persons operating the Toro in such circumstances as the Toro overturning or tipping. The witness described that he went up to the professional person at the golf shop and spoke to him, a man he knew to be named George and was informed that the Toro was used all over the golf course. The witness gave evidence that in his experience the machine should be fitted with ROPS.

27 What led the witness to that conclusion is that back in 2005 following his commencement with WorkSafe they looked at the supply of plant into Western Australian workplaces. A lot of plant coming into Western Australia was unguarded. In particular John Deere was supplying tractors into Western Australia and not only were the field bins incorrectly guarded but the tractors were not fitted with ROPS. Back then a South Australian company could fit a tractor type ROPS to the gator but it was heavy. In hindsight it was not practicable to ask the workplace to undertake such a task because it was not designed for such a purpose. In other words it was not manufactured for the plant. Over time the witness gave evidence that as other types of plant came into Western Australia such as forestry plant the witness gave evidence that a significant problem was being identified with quad bikes. Five fatalities had occurred with quad bikes and the issue with quad bikes is the lack of helmets. Over the years there is now numerous side-by-side plant developing like the Toro. There is now a range of plant in Western Australian workplaces, all different types of combinations have been developed. The witness gave evidence that there has been a progression of plant in workplaces and manufacturers have got over the hurdle of operator protective devices and have achieved the placement of ROPS and placement of seatbelts. It is pleasing to see that John Deere are now built to order just like Toros to have ROPS as bolt on facilities provided to employers as an accessory provided at the point of supply.

28 The witness indicated that in 2012 Western Australia appeared to have solved the issue of ROPS on utilities which is why when he was on the golf course he was surprised to see the Toro because it was the first time he had seen a side-by-side or a utility that did not have ROPS. The witness considered with what he had been undertaking in the last 10 years in relation to plant in his opinion there is a risk and the easiest way to mitigate the risk would be to put the device on, that is ROPS and seatbelts. The witness clarified that when he referred to side-by-side he referred to a utility vehicle such as a Toro some of them are referred to as side-by-side some of them are referred to as utility vehicles and some of them are called ATVs.

29 The witness gave evidence that he wrote the prohibition notice (exhibit Sanctuary 1) the following day simply because of the time and because he was not at work at the time he saw the breach. The inspector gave evidence that he returned to the applicant's premises the following morning and wrote the following:

Prohibition Notice 90005929

Issued to Southern Golf Sanctuary Resort Pty Ltd

PO Box 7008 EATON 6232

I have formed the opinion that there is occurring an activity at a workplace which involves a risk of imminent and serious harm to the health of a person.

1. The Activity is Use of Toro Workman without operator protective devices

at OLD COAST ROAD PELICAN POINT 6230 on 20 Aug 2014

2. The grounds for my opinion and the matters which give rise to the risk are: Employees are at risk of serious injury or death in the event that the powered mobile plant (Toro Workman MD) overturned and the operator was ejected from the seat and being crushed by the Toro Workman

3. In my opinion the activity involves contravention of regulation 4.44(1)(a) of the Occupational Safety and Health Regulations 1996 and the grounds for my opinion are My investigation revealed that that you are the employer at the above workplace. While standing on the golf driving range I observed a young worker operating a powered mobile plant (Toro Workman MD –serial no. unknown) collecting golf balls without a roll-over protective structure being fitted to the Toro Workman. I was told this worker had been employed on a casual basis. Inspection of the Toro Workman MD also found that seat belts were not fitted. This lack of an appropriate combination of operator protective devices (roll-over protective structure and seat belts) exposes the operator to the risk of serious injury/death in the event that the plant overturned. Furthermore I was told by the supplier that there was a risk of the Toro Workman MD overturing.

4. In accordance with Section 49 of the *Occupational Safety and Health Act 1984*, the carrying on of the activity at that workplace is prohibited until the matters mentioned in paragraph 2 have been remedied.

5. You are directed to take the following measures:

Received by Rob Miguel	Position	Manager Date	21/8/2014
Signature of Recipient	(Signed)	Time (24hr):10.30	
Workplace Contact Name	Rob Miguel	Contact Phone No. 97252777	
Inspector FOOT, IAN	702	Signature	(Signed)

(exhibit Sanctuary 1)

30 On the reverse of the prohibition notice s 51 and s 51A of the Act were displayed informing the person or the employer to whom a prohibition notice is issued that that person may refer the notice for review to the WorkSafe Western Australia Commissioner for review. If not satisfied with the Commissioner's decision the matter may be referred within seven days of the decision to the Tribunal in accordance with s 51A of the Act.

31 In circumstances where the notice such as this one being a prohibition notice the notice is required to be displayed in the workplace, together with a copy of the Regulations in particular reg 4.44(1)(a).

32 The witness was asked by counsel for the respondent whether there was any other information he had relied on to defend his opinion that the applicant ought be served with a prohibition notice. In response, the witness answered that part of his job was to read operator manuals for numerous utility vehicles and side-by-sides. The witness gave evidence that, as part of his job, he is required to keep himself up to date with developments in terms of plant, so that when he forms an opinion, in this case where his opinion was formed at the Sanctuary that previous afternoon, he had already read the manuals for various utility vehicles similar to the Toro. The witness gave evidence he actually got a copy of the manual late in the afternoon of 20 August 2014, sat down and read the manual, and then returned to the site the following morning, and spoke to the assistant manager.

33 The witness gave evidence that he considered there was a risk of the Toro overturning, and based on his knowledge he put that risk at a five out of 10. The witness' knowledge was based on his experience, his knowledge from reading the manual, from contacting Toro Australia and speaking with the local Western Australian representatives, and importantly, his experience in the industry. The witness gave evidence he wanted to check on the availability of ROPS and seatbelts here in Western Australia before writing the notice. In contacting Toro and another company, he was assured that ROPS and seatbelts to fit the Toro were readily available and would take a couple of hours to fit.

34 In his final discussion with Mr Miguel the witness advised that he issued the notice informing the Sanctuary that he had formed an opinion that there was an activity at the workplace which involved a risk in the use of the Toro without ROPS. The risk exposed persons to a hazard in the event of an overturn, and that risk was of imminent and serious harm to a person. The grounds for his opinion and the matters which gave rise to the risk were that the employees were at risk of serious injury or death. The witness was asked to clarify what caused him to write the notice. In response, he answered:

> In relation to the operation of this Toro, to me imminent is the operation of the machine, so when you jump on it and start it up and driving down the road, to me that's – in the event of something happening, that's where imminent comes into play, so in my opinion the provision of ROPS and seatbelts when you first get on that machine and just like when you're driving a vehicle, your personal vehicles, you've got your seatbelt on and you're driving down the road so you are prepared for imminent whatever if something was to happen. My opinion is it comes to the use of ROPS and seatbelts in relation to the use of that when it comes to imminent because you can't – because when it's happening you can't prepare yourself for the imminent. You've got to be ready for it.

(ts 36)

35 Counsel for the respondent put it to the witness that he had written in the notice:

> The grounds for my opinion and the matters which give rise to the risk are employees are at risk of serious injury or death.
>
> (ts 36)

36 The witness was asked whether he made enquiries as to whether there were employees at risk on the golf course. In response, the witness answered that he was informed by George on the night of 20 August 2014. In addition the witness saw the young man at the golf course getting on and off the Toro and the comment made by George that this piece of plant was used all over the golf course for a number of different activities. The witness gave evidence he formed the opinion that employees at this work place were at risk of serious injury or death.

37 The witness was referred back to the grounds by which he formed his opinion. That being:

> Employees are at risk of serious injury or death in the event that the powered mobile plant (Toro Workman MD) overturned and the operator was ejected from the seat and being crushed by the Toro Workman.
>
> (extract from exhibit Sanctuary 1)

38 The witness gave evidence that the use of utilities such as the Toro was becoming more common in the workplace and it was necessary to ensure that their use was carried out safely to ensure there were no more workplace fatalities.

39 In the witness' opinion:

> It's a question of when we have a utility vehicle go over and in my opinion if we can get these things right now so that when one goes over we are trying to limit the effect of the end user. The documentation is there. Ninety per cent of people who are wearing seatbelts and have ROPS survive a roll-over. Seventy per cent of people survive roll-overs with just the ROPS without wearing the seatbelts because there is the combination of the two, but the figures are out there that unless you're thrown free of the vehicle when it goes over and it falls on top of you, you're going to be crushed and to me it's practical to do something and it's not an expensive item to resolve the problem. I can see where Rob is coming from with the issue of seatbelts. I can understand that myself, the fact that on certain times when you're only going 20 yards at a time and you're getting off it, it's that pain of having to put the seatbelt on, but there's also those times when at the Sanctuary you're at the clubhouse and you want to go down to the end of green number 11, it's a long drive. Put the seatbelts on. I can't say don't wear a seatbelt when you're only going 20 yards, but let's get back to reality. Seatbelts are there for a reason.
>
> (ts 37)

40 The witness was asked what his view was about whether they should or should not wear a seatbelt for 20 yards, bearing in mind what he had just said. In response, the witness indicated he could live without the worker having to wear a seatbelt.

> If I went to a workplace and I saw Sanctuary golf course and I was playing golf and happened to see a Toro come around the corner with the ROPS and the seatbelts in position and the guy wasn't wearing it and I could see that he was fixing the sprinklers up every 20 yards and he was slow speeds and doing the right thing, I could live with that, if I saw that all of a sudden he'd come past me and went back to the clubhouse he had a seatbelt on. That would show to me there's a system there that enabled – it shows that the employer and the employee have got together, figured it out and they've got something that's workable.
>
> (ts 38)

41 In cross-examination, the witness was asked, of the golf courses he played at, whether the Sanctuary was less hilly and less strenuous than the majority of other courses. In response, the witness indicated he would rank the Sanctuary in the middle as the water ramps on the 10th and 16th holes provide a danger, and probably the biggest risk is that of the Toro slipping into the water. There are parts of the golf course that the witness indicated he had concerns in relation to roll over.

42 In concluding, counsel for the respondent submitted that the opinion formed by Inspector Foot at the time concluded it was appropriate to issue a prohibition notice. In such circumstances, the risk needs to be more than a mere possibility. In the decision of ***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1991) 72 WAIG 477 (***Wormald Security FB***) the respondent says that there must be some evidence on which the inspector has based his opinion, and that evidence must go further than to establish a mere possibility in respect of the risk.

43 In this circumstance, at the Sanctuary, the situation was the risk of the Toro overturning. This is identified through the evidence and it was submitted that there is a risk and it was more than a mere possibility as identified in ***Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare*** (1992) 74 WAIG 2 (***Wormald Security IAC***). It is accepted by the operator's manual (exhibit WorkSafe 1) that the risk does exist, and together with the circumstances of the environment and the use of the Toro which has the effect of increasing or lowering that risk at the Sanctuary there are some 78 sand traps. In addition, undulations, hills, ditches, creeks and unfamiliar areas increase the risk.

44 It was submitted that the Sanctuary contained slopes of various kinds and when Inspector Foot saw the Toro being used without ROPS, for the first time, it caused him to be alert to the risk at the driving range, which he described as a slope down to a water trap which contained an elevation. The next conclusion that needed to be reached by the inspector is that there was a serious and imminent injury that may result from that risk. The notice itself, along with the evidence of Inspector Foot, identifies there is a risk of serious injury or death as a result of overturning. If a vehicle that is some 750 kilograms in weight can travel up to 26 kilometres an hour, can carry potentially two people in addition to a load was to overturn, the various types of injury, and I am unable to list all of the injuries, but it can be contemplated that if a person were to be thrown from the

vehicle, then a serious injury may result. If the person happened to be trapped or crushed by the vehicle then that could be serious if not fatal.

45 Counsel for the respondent indicated that in terms of the meaning of serious and imminent, he referred again to the ***Wormald Security IAC*** decision which agrees that the word 'imminent' means impending, threateningly, hanging over one's head, ready to overtake one, or coming on shortly. That is to be given some context, in the submission of the respondent, in relation to a prohibition notice, and should be tempered against something that is immediate as a prohibition notice cannot be directed at an immediate threat. The type of threat that a Toro poses if it were to tip over would be an imminent and serious threat of injury, as defined by s 49 of the Act.

46 For example:

> Being employees of Southern Golf that at any time unbeknown to them that they could drive into the sand trap. They could drive unknowingly down the – down a slope. They could turn sharply for whatever reason. They could use excessive speed, maybe even unwittingly. They could hit a ditch, or they might be in an unfamiliar area. All those risks defined in the operation manual, which were accepted by Mr Goulis. I have an example of a matter which has come before yourself, Commissioner, and this Tribunal previously in regards to a prohibition notice. And the decision is called *Perkins (WA) Pty Ltd v WorkSafe Western Australia Commissioner*.
>
> (ts 46)

47 Another issue to consider is whether or not it is practicable to fit the ROPS and seatbelts, and the cost associated. The Commission is required to temper that cost and time against the impact it has upon the employer against the potential outcome if the device is not fitted. The respondent submits that the potential outcome is a fatality if the Toro were to roll, measured against the time and cost imposed fitting that device, which the respondent submits is negligible when weighed up against the potential outcomes. The use of the equipment is fairly simple. The ROPS does not require the operator to know anything, and a seatbelt is a common item known to almost all people in our society these days. In such circumstances, it is submitted that it is practicable to fit ROPS and seatbelts to the Toro vehicles and the inspector's opinion in regards to that potential breach of reg 4.44 in reliance in issuing the prohibition notice is, in the respondent's view, sound and should not be subject to amendment.

48 In conclusion, the respondent addressed the applicant's statement of claim, in particular the assertion that the respondent in the prohibition notice had incorrectly classified Toro as being a vehicle classified as an all–terrain, the difference between the two-wheel drive and a four-wheel-drive model. Counsel for the respondent submitted that it was the use of the vehicle whether a two-wheel drive or four-wheel drive which was the question that related to the use of the Toro at the Sanctuary. The risk to the two-wheel drive vehicle is created not because it is a two-wheel drive but because of where it is being used in that it is an undulating golf course associated with the matters already described such as sand traps.

49 The second ground raised by the applicant is in the view of the respondent an unreasonable assumption that the applicant relies on a history at the workplace of over 20 years without incident. The evidence of the respondent is that side-by-side vehicles such as the Toro are becoming more prevalent in Western Australia and are taking over from where quad bikes were ordinarily being used in workplaces. The prohibition notice is, in the view of the respondent, seeking to prevent what may be an imminent and serious injury in the future.

50 The third ground is raised by the applicant is the admission of risk. In essence the applicant submits that the warnings contained in the operator's manual (exhibit WorkSafe 1) reflect a more litigious society where repeatedly machinery is raised associated with warnings to avoid a liability. The respondent submitted that that was not the view taken in relation to warnings reflected in operator's manuals associated with machinery. They are relied upon as a guide to the operator:

> They're informative of what risks the operator is exposed to when using the machine and offer advice or suggestions as to how to avoid exposure to those risks. I really – with respect, I think that argument really doesn't have any merit, because it's a risk identified in an operation manual proposed to be given to an operator of the vehicle, within an environment where there is a risk of imminent and serious injury or harm.
>
> (ts 49)

51 The fourth ground raised by the applicant in his application is the issue of precedent. That being if ROPS are required to be fitted to the Toro the requirement would have a large impact on industry in general but not limited to golf and turf courses. The respondent reflected that this application identifies the Sanctuary with its two Toro vehicles currently at that workplace and the prohibition notice is about what the workplace should do to prevent future injuries. It is in that environment and it is always specific to the circumstance associated with what has been in this case a prohibition notice as issued. The respondent is clearly of the view that no precedent is performed by upholding the prohibition notice.

Findings and Conclusion of the Tribunal

52 The Tribunal has had the opportunity of observing closely the persons who gave evidence in these proceedings, Mr Goulis and Inspector Foot. It is the Tribunal's view that the evidence given by each of the witnesses was given clearly and to the best of their recollection. I consider each witness to have been reliable, credible and honest.

53 As is reflected in the Act in applications of this nature such matters need to be filed within seven days of the s 51(6) notice affirming the prohibition notice issuing. A reference may be made under s 51A(1) in the prescribed form within seven days of the issue of the notice under s 51(6). On this occasion the WorkSafe Western Australia Commissioner issued his s 51(6) notice on 27 August 2014 and the applicant's Form 7 – Notice of Referral to the Occupational Safety and Health Tribunal was received in the Registry on 3 September 2014. Accordingly the Tribunal finds the application meets the seven day requirement of s 51A(2) of the Act.

54 It was not in dispute that Inspector Foot issued the applicant with a prohibition notice 90005929 (exhibit Sanctuary 1) pursuant to s 49 of the Act on 21 August 2014 and the respondent affirmed that notice, following a s 51 review of the notice by WorkSafe Western Australia Commissioner on 27 August 2014. It was not in dispute that the service of the prohibition notice (exhibit Sanctuary 1) was on Mr Miguel as the person with management and/or control of the workplace.

55 The Tribunal has considered the oral submissions of Mr Miguel and the documentary and oral evidence of the applicant which included evidence from Mr Goulis, the supplier of the two Toro utility vehicles to the Sanctuary.

56 The Tribunal has considered the oral submissions of Mr Bishop, counsel for the respondent together with the documentary evidence and the oral evidence of Inspector Foot a regional inspector for the respondent located in Bunbury.

57 At the invitation of Mr Miguel the Tribunal was invited to applicant's workplace on 1 October 2014 at 11.00am in particular to inspect the workplace terrain. Following the inspection discussions were held with Mr Miguel, Mr Jeff Thompson (the WA Area Sales Manager of Toro) and a long term employee of the applicant Mr Bill Watchman. Subsequently, discussions were held with Mr Foot and Mr Brett Cooper (Manager Regional and Primary Industries Team) of WorkSafe.

58 Having inspected the Sanctuary which involved a short drive around various holes of the course together with Mr Miguel and Mr Foot, the Tribunal was informed the golf course was reclaimed some 20 years earlier from swamp land. The Tribunal finds that the terrain of the Sanctuary is made up in part of undulations, waterholes, ramps and sand bunkers. In some parts of the course the fairways are relatively steep. In particular the fifth hole which has water on both sides. In other parts the course is relatively flat. The Tribunal considers that the terrain is such at the Sanctuary there is a risk that powered mobile plant may overturn.

59 In considering the applicant's submission the Tribunal has had regard for the operation of the Sanctuary for some 20 years without incident. In addition the Tribunal has considered the speed with which the Toro operates in and around the Sanctuary, that being a maximum of 18 kilometres per hour. Furthermore, the Tribunal has considered the low ground clearance and the central system on the Toro which twists as the Toro moves over undulating terrain. The applicant's submissions in relation to the golfing industry in comparison to the forestry and agriculture industries have been noted by the Tribunal. The applicant considers the prohibition notice would operate as a precedent and submits that the Sanctuary is safer than most golf courses. Further the applicant submits the Toro should be able to operate without ROPS and without seatbelts. The position of the applicant is that prohibition notice 90005929 should be revoked in its entirety.

60 The submissions of the applicant regarding seatbelt use over <u>short distances</u> (my emphasis) in particular have been helpful and have been similar to the evidence of Inspector Foot. It certainly was not a suggestion that seatbelts should be disregarded as the evidence suggested that the Toro is used in both long and short distance operations at the Sanctuary. The Tribunal finds that seatbelts <u>need not necessarily</u> (my emphasis) be used over short distances but <u>must</u> (my emphasis) be used over long distances. The Tribunal considers it appropriate, having determined during site inspections that the joint occupational workplace health and safety committee operating at the Sanctuary should develop a site policy in this regard. Accordingly, the Order issuing in conjunction with these reasons will reflect that the committee should meet, as soon as is practicable to draw together a workplace policy on seatbelt use for the Toro.

61 Before a prohibition notice can issue under s 49 of the Act it is necessary for an inspector to form an opinion that an activity is occurring at the workplace or is likely to occur and this specific activity may involve a risk of imminent and serious injury to or imminent and serious harm to the health of a person. In interpreting the provision reflected under s 49 of the Act such an opinion must be formed by the inspector upon reasonable grounds, in other words it must be credible.

62 However, the inspector can reach a requisite opinion without recourse to other sections of the Act. This principle was reflected in the Full Bench decision ***Wormald Security FB***. His Honour the President held at 485:

> All that the Inspector has to reach an opinion as to is set out in s.49(1*)* Occupational Health, Safety and Welfare Act 1984. S.19 of the OHSW Act sets out the duty cast upon employers, and they can be prosecuted for a breach of that duty. It is not necessary for the Inspector to establish that there has been a contravention of the Act, be it s.19 or not, although, if that is alleged, it must be stated in the particulars of the notice.
>
> However, the Inspector can reach a requisite opinion without recourse to other sections of the Act. That is made plain by the clear words of s.49 of the OHSW Act.

63 The meaning of 'imminent and serious' is drawn from ***Wormald Security IAC*** at page 3 where Franklin J of the Industrial Appeal Court determined as follows:

> Because the opinion that the activity involves a risk and so the probability of serious and imminent injury must be formed by the Inspector and be supported by expressed reasons (s49(3)(b)), it follows, in my view, that there must exist some evidence on which to base the opinion and that evidence must go further than to establish only a possibility. Consistently with the view expressed by Nicholson J it is my opinion that for the formation of a justifiable opinion under s49(1) that the relevant activity involves or will involve a risk of imminent and serious injury or harm, the evidence must show that there exists something more than the bare possibility that injury or harm of that nature will occur from the activity in question.

64 The respondent affirmed the prohibition notice 90005929 ([6] of these Reasons of Decision), following a s 51 review of the notice by the WorkSafe Western Australia Commissioner on 27 August 2014.

65 The Tribunal finds the Sanctuary, in using the plant in question, that is the Toro without ROPS or seatbelts fitted, involves a risk of imminent and serious injury occurring was more than a 'bare possibility' as it was defined in ***Wormald Security IAC.*** The Tribunal has relied on the evidence of Inspector Foot with particular reference of the risk of a bare possibility drawing from the operator's manual (exhibit WorkSafe 1).

66 In ***Wayne Vigar Sheetmetal v WorkSafe Western Australia Commissioner*** [2005] WAIRC 01869; (2005) 85 WAIG 2068:

> I find that the WorkSafe Commissioner is an administrative authority for the purposes of considering case law on this matter. In such circumstances where a right of appeal is provided to a court, in this case to the Tribunal from a decision of an administrative authority, in this case the WorkSafe Commissioner, the review is to be by way of re-hearing. This refers to the process of undertaking a matter as a hearing de novo although clearly such an approach can vary: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) HCA 47 (31 August 2000) 118.

67 Section 51A(2) provides that a further review by the Tribunal of improvement and prohibition notices issued by WorkSafe shall be 'in the nature of a re-hearing'. The statute makes no provision for the manner in which a re-hearing is to be undertaken by the Tribunal nor does it in any way specify what type of procedure is to be adopted in regard to the evidence relied upon by the Tribunal in determining what action to take with respect to the notice issued at first instance.

68 A consideration by the Tribunal pursuant to s 51A is intended to be a hearing de novo. The basis for such an approach is drawn from ***Tsintris v Roads and Traffic Authority of New South Wales*** (1991) 25 NSWLR 69, (72 – 73) Lee A J proffers the following:

> The appeal is one from an administrative decision in which the plaintiff has played no real part in respect of which she has no right to advance witnesses or challenge the basis upon which the Authority is acting, seems to me to lead inevitably to a conclusion that the appeal given by s 7(4) and stated to be 'in the nature of a re-hearing' is intended to be a hearing de novo.

69 To ensure a fair and equitable process in the proceedings before the Tribunal the applicant is entitled to bring all matters and require all documentation or information to be placed before the Tribunal up until the time in which the matter is heard. This may, in some cases, involve a request for information relied upon by the WorkSafe Western Australia Commissioner in reviewing the notice pursuant to s 51. The Tribunal so finds.

70 The Regulations, in particular reg 4.44(1)(a) specify:

> **4.44 Powered mobile plant, duties of supplier of and employer etc. as to**
>
> (1) Subject to regulation 4.45, a person who, at a workplace at which there is any powered mobile plant, is an employer, the main contractor, a self-employed person, a person having control of the workplace or a person having control of access to the workplace must ensure in relation to each item of powered mobile plant that —
>
> (a) if there is any risk that —
>
> (i) the plant could overturn; or
>
> (ii) an object could come into contact with the operator of the plant; or
>
> (iii) the operator of the plant could be ejected from the seat,
>
> then, as far as practicable, the risk is limited by the provision of an appropriate combination of operator protective devices, and that those devices are maintained and used appropriately; and
>
> (b) if there is a risk that an object may come into contact with the operator of the plant from the front, side or rear of the plant then, as far as practicable, the risk is limited by the provision of an appropriate structure that protects the operator.

71 Having heard the submissions of the applicant and the respondent together with the evidence of both witnesses and having examined the terrain of Sanctuary the Tribunal has had regard for reg 4.44(1)(a) of the Regulations. The Tribunal finds that the operation of the Toro without ROPS and without seatbelts is in contravention of the aforementioned reg in that employees are at risk of serious injury and potentially death. In making my decision I have had regard for the operator's manual (exhibit WorkSafe 1), the following extract in particular:

- Failure to operate the vehicle safely may result in an accident, tip over of the vehicle, and serious injury or death. Drive carefully. To prevent tipping or loss of control:
  - Use extreme caution, reduce speed, and maintain a safe distance around sand traps, ditches, creeks, ramps, unfamiliar areas, or any areas that have abrupt changes in ground conditions or elevation.
  - Watch for holes or other hidden hazards.
  - Use extra caution when operating the vehicle on wet surfaces, in adverse weather conditions, at higher speeds, or with a full load. Stopping time and distance will increase with a full load.
  - Avoid sudden stops and starts. Do not go from reverse to forward or forward to reverse without first coming to a complete stop.
  - Slow down before turning. Do not attempt sharp turns or abrupt manoeuvres or other unsafe driving actions that may cause a loss of vehicle control.
  - When dumping, do not let anyone stand behind the vehicle and do not dump the load on anyone's feet. Release the tailgate latches from the side of the box, not from behind.

(p 5 exhibit WorkSafe 1)

72 Section 3 of the Act defines practicable as follows:

> ***Practicable*** means reasonably practicable having regard, where the context permits, to —
>
> (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring; and
>
> (b) the state of knowledge about —
>
> (i) the injury or harm to health referred to in paragraph (a); and
>
> (ii) the risk of that injury or harm to health occurring; and
>
> (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health; and
>
> (c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);

73 While the Tribunal has considered the issues surrounding the severity of any potential injury or harm to health and the degree of risk of it occurring together with the state of knowledge. I refer here to the general knowledge regarding ROPS, seatbelts and the evidence given in these proceedings regarding powered mobile plant used in Western Australian workplaces. Referring to the definition of '*Practicable'* in the Act [(c)] refers to 'the availability, suitability, and cost of the means referred to in paragraph (b)(iii)'. The Tribunal finds in this regard that the cost to fit ROPS and seatbelts is $1,500 per vehicle plus two hours labour. In the case of the Sanctuary there are two Toros that require fitting and accordingly the Tribunal considers the overall financial cost when taking the risk of potential harm to employees into account to be relatively inconsequential.

74 While the applicant's submission is that the inclusion of such paragraphs in the operator's manual is similar across all manufacturers therefore you cannot mitigate all risks the Tribunal finds in the case of the Toro the risk is capable of being limited by the provision of a combination of ROPS and seatbelts. The Tribunal considers in the case of the Sanctuary, it is practicable to do so.

75 The Tribunal, pursuant to s 51A(5)(b) of the Act considers that the decision of the Commissioner of Worksafe Western Australia of 27 August 2014 to affirm the Prohibition Notice 90005929, with a single modification:

> In relation to how seatbelts are to be used on the Toro Workman MD while operating on the premises of the applicant the Occupational Health and Safety Committee for the applicant will meet as quickly as practicable to develop a seatbelt policy for practical application at the workplace of the applicant. In broad terms, that policy will ensure that where the Toro Workman MD is being used over short distances seatbelts may not necessarily be used. At all other times seatbelts will be secured (by both the driver and a passenger, where one is present) when using the Toro Workman MD.

76 The Tribunal in affirming prohibition notice 90005929 with a modification as specified in [78] the applicant is required to, in accordance with the Act and reg 4.44(1)(a) of the Regulations remedy the two powered mobile plant (Toro) on site by fitting each one with a roll over protective structure and seatbelts.

77 In accordance with s 49 of the Act the carrying on of the '**activity**' ('**activity**' being the use of the Toro without a roll over protective device and without a seatbelt) at the workplace of the applicant is prohibited until the matters referred to in the Order associated with the Reasons for Decision have been complied with.

78 A minute has already issued. An order will issue reflecting these Reasons for Decision.

2014 WAIRC 01193

REVIEW OF PROHIBITION NOTICE

THE OCCUPATIONAL SAFETY & HEALTH TRIBUNAL

PARTIES	SOUTHERN GOLF PTY LTD TRADING AS SANCTUARY GOLF RESORT
	APPLICANT
	-v-
	LEX MCCULLOCH, WORKSAFE WESTERN AUSTRALIA COMMISSIONER DEPT OF COMMERCE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 23 OCTOBER 2014
FILE NO/S	OSHT 2 OF 2014
CITATION NO.	2014 WAIRC 01193

Result	Prohibition Notice 90005929 affirmed with modification
Representation	
Applicant	Mr R Miguel
Respondent	Mr T Bishop (of counsel)

Order

HAVING HEARD Mr R Miguel on behalf of the applicant and Mr T Bishop (of counsel) on behalf of the respondent, the Occupational Safety and Health Tribunal, pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* hereby orders –

1. THAT the Occupational Safety and Health Tribunal, pursuant to s 51A(5)(b) of the *Occupational Safety and Health Act 1984*, hereby upholds the decision of the Commissioner of Worksafe Western Australia of 27 August 2014 in relation to Prohibition Notice 90005929, with the following modification:
   (a) In relation to how seatbelts are to be used on the Toro Workman MD while operating on the premises of the applicant the Occupational Health and Safety Committee for the applicant will meet as quickly as practicable to develop a seatbelt policy for practical application at the workplace of the applicant. In broad terms, that policy will ensure that where the Toro Workman MD is being used over short distances seatbelts may not necessarily be used. At all other times seatbelts will be secured (by both the driver and a passenger, where one is present) when using the Toro Workman MD.
2. THAT in affirming Prohibition Notice 90005929 with a modification as specified in clause 1(a) herein the applicant is required to, in accordance with the *Occupational Health and Safety Act 1984* (the Act) and in particular r 4.44(1)(a) of the *Occupational Safety and Health Regulations* remedy the two powered mobile plant (Toro Workman MD) on site by fitting each one with a roll over protective structure and seatbelts.
3. In accordance with s 49 of the Act the carrying on of the '**activity**' ('**activity**' being the use of the Toro Workman MD without a roll over protective device and without a seatbelt) at the workplace of the applicant is prohibited until the matters referred to in this Order have been complied with.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2014 WAIRC 00425

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	NAVS TRANSPORT PTY LTD
	APPLICANT
	-v-
	CODESTYLE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 22 MAY 2014
FILE NO/S	RFT 4 OF 2014
CITATION NO.	2014 WAIRC 00425

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr T B Lyons of counsel

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr T B Lyons of counsel on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby directs –

(1) THAT the respondent file and serve a notice of answer by 19 June 2014.

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

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

2014 WAIRC 01032

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

BETWEEN	**:**	NAVS TRANSPORT PTY LTD
		Applicant
		AND
		CODESTYLE PTY LTD
		Respondent
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 19 SEPTEMBER 2014
DELIVERED	**:**	FRIDAY, 19 SEPTEMBER 2014
FILE NO.	**:**	RFT 4 OF 2014
CITATION	**:**	2014 WAIRC 01032

Catchwords	**:**	Owner-driver contract – Referral of dispute regarding payment of claim – Principles applied – Order issued
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA) ss 3, 4(2)(b), 5
		Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (WA) s 10
Result	**:**	Application upheld
Representation:		
Applicant	**:**	Mr A Dzieciol of counsel
Respondent	**:**	No appearance

Reasons for Decision

Ex Temporé

1 In this matter the applicant, Navs Transport Pty Ltd claims against Codestyle Pty Ltd, by amended particulars of claim, the sum of $6,644.87 for work performed for the respondent but not paid for. As there is no appearance by the respondent, the evidence of the applicant is not contested. The evidence of Mr Ramlukun, which has been given under oath, is accepted by the Tribunal and from that evidence, the Tribunal is satisfied and finds as follows.

2 At all material times, in or about October to November 2013, the applicant operated two trucks both of which the Tribunal is satisfied, were and are heavy vehicles for the purposes of s 3 of the Owner-Drivers (Contracts and Disputes) Act 2007, and I refer to exhibit A1 in that regard. Secondly, that Mr Ramlukun is a director of the applicant company and drove a truck supplied by the company and therefore is an owner-driver and was an owner-driver at the material time, for the purposes of s 4(2)(b) of the OD Act. Thirdly, that Mr Ramlukun, on behalf of the applicant, entered into an owner-driver contract with the respondent for the purposes of s 5 of the OD Act, seemingly to transport containers from ports to customers in the metropolitan area. Fourthly, that a driver employed by the applicant and who worked for the respondent in accordance with the owner-driver contract, did so over the period from about 14 October 2013 up to and including 6 November 2013, in accordance with the owner-driver contract, and as evidenced by invoices numbered 003 to 007, as set out in exhibit A2, services were performed to a total value of $8,444.87.

3 The Tribunal is further satisfied that in or about May to July 2014, the applicant has only received from the respondent, the sum of $1,800 in respect of monies owed by the respondent to the applicant. Accordingly, in accordance with the amended particulars of claim, the sum of $6,644.87 remains outstanding.

4 A final matter to which the Tribunal will refer, is the evidence of Mr Ramlukun that in relation to the performance of the owner-driver contract over the relevant period, it appears that two minor incidents occurred which seem to have caused some minor damage to the property of a customer or customers. However, the evidence is and the Tribunal accepts, that no claim for payment of compensation was made either by the customer to the applicant or alternatively by the respondent to the applicant. Certainly, on the evidence, no notice has been given to the applicant by the respondent in accordance with s 10 of the Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010. Therefore, in the Tribunal's view, there is no lawful basis for any deduction by the respondent from monies owed to the applicant.

5 Accordingly, from the evidence, the Tribunal is satisfied and finds that the sum of $6,644.87 remains owing to the applicant by the respondent and an order will be made in the applicant's favour, plus interest.

2014 WAIRC 01033

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	NAVS TRANSPORT PTY LTD
	APPLICANT
	-v-
	CODESTYLE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 19 SEPTEMBER 2014
FILE NO/S	RFT 4 OF 2014
CITATION NO.	2014 WAIRC 01033

Result	Declaration and order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance

Declaration and Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and there being no appearance on behalf of the respondent the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby –

(1) DECLARES that the respondent is indebted to the applicant in the sum of $6,644.87.

(2) ORDERS that the respondent pay to the applicant the sum of $6,644.87 plus interest pursuant to s 14 of the Owner-Drivers (Contracts and Disputes) Act 2007, in the sum of $282.70 within 21 days of the date of this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 01078

DISPUTE RE OUTSTANDING PAYMENTS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2014 WAIRC 01078
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 17 SEPTEMBER 2014
DELIVERED	**:**	TUESDAY, 30 SEPTEMBER 2014
FILE NO.	**:**	RFT 5 OF 2014
BETWEEN	**:**	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH Applicant AND L.D RITCHIE & S.D RITCHIE Respondents

Catchwords	**:**	Owner-driver contract – Referral of dispute regarding payment of claim – Agreed terms of the owner-driver contract in dispute – Credibility – Principles applied – No agreement for deductions – Unlawful deductions – Application upheld – Order issued
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007* (WA) *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA) ss 10, 10(2)(a)(ii), 10(2)(b)
Result	**:**	Application upheld

Representation:

Applicant	:	Mr P Sinagra and with him Ms J Sinagra
Respondents	:	Ms S Ritchie and with her Mr L Ritchie

Reasons for Decision

1 Mr Sinagra who trades under the name Joondalup Transport, entered into an owner-driver contract with Mr and Mrs Ritchie in November 2013, to cart grain largely in the mid-west of the State, following the grain harvest season. There was no dispute that Mr Sinagra is an owner-driver for the purposes of the Owner-Drivers (Contracts and Disputes) Act 2007 and that an owner-driver contract for the purposes of the OD Act was entered into between the parties. Based on the evidence adduced in these proceedings, the Tribunal is so satisfied and finds accordingly.

2 What is in dispute in this matter is the issue of deductions made from monies paid by the Ritchies to Mr Sinagra, in respect of two items, they being trailer hire and an administration fee. Mr Sinagra contends that there was no term of the owner-driver contract to this effect and secondly, any such deduction was, in any event, contrary to s 10 of the Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010. The Ritchies disagree. The sum in question is $3,309.38.

3 The case before the Tribunal turns on a resolution of a conflict on the evidence between Mr Sinagra and Mr Ritchie. For the following reasons, which I can relatively shortly express, I prefer the version of the events outlined by Mr Sinagra to that of Mr Ritchie. The Tribunal therefore concludes that Mr Sinagra's application should succeed.

4 Mr Sinagra testified that as an owner-driver he drives a 120 tonne rig and is engaged in general cartage. Mr Sinagra has carted grain previously. Mr Sinagra testified that he received a telephone call from Mr Ritchie in early November 2013, asking him what he was doing for the upcoming grain harvest season. Mr Sinagra said that Mr Ritchie informed him that one of his drivers had left at short notice and he needed some assistance. Mr Sinagra told Mr Ritchie that he did not have a second trailer which may be a problem in carting grain. Mr Sinagra's evidence was that Mr Ritchie informed him to not worry about that and whether he would be prepared to work for him. Mr Sinagra testified that he asked Mr Ritchie about the cost of renting a trailer from Mr Ritchie and was told he would provide Mr Sinagra with one of his, as "my guy let me down". Nothing else was discussed according to Mr Sinagra.

5 Subsequently on 6 November 2013, Mr Sinagra started carting grain. He was working on farms in the Badgingarra and Geraldton regions of the State. Mr Sinagra testified that whilst working, he generally stayed in his truck and used roadhouses for accommodation, over the three to four week period involved. He did say however, that he occasionally used the Ritchies' premises for the occasional shower and meal for which he offered to pay. Mr Sinagra's evidence was that the trailer provided to him by the Ritchies was an old trailer and was not in very good condition. He testified that he had to put two second-hand tyres on it and the springs also needed to be fixed.

6 From the terms of exhibit A1, a tax invoice from the Ritchies, reference is made to daily jobs undertaken by Mr Sinagra at the stated tonnage rates. Dockets from Mr Sinagra to the Ritchies, for grain cartage, are dated from 15 November through to and including 3 December 2013. On exhibit A1, is a deduction for the amount of "Trailer Hire" in the sum of $2,300 and a further deduction for an "Administration fee" in the sum of $1,009.38. It is those two deductions made from payments to Mr Sinagra, which are presently in dispute. Mr Sinagra was emphatic that he never requested to hire a trailer from the Ritchies, had alternative work in Perth at the time, and was never informed of any incidental costs that made up the administration fee deducted.

7 The version of events outlined by Mr Ritchie, although at times vague, was completely to the contrary. Mr Ritchie testified that some time in November 2013 he spoke by telephone or on the UHF radio with Mr Sinagra and asked him what he was doing about grain cartage for that season. According to Mr Ritchie, Mr Sinagra said that as he didn't have a second trailer he would need one. Mr Ritchie said they didn't hire trailers out but if Mr Sinagra was prepared to help out with a job they had "next door", then Mr Sinagra could use one of the Ritchies' trailers.

8 According to Mr Ritchie, he did not agree on a rate for the trailer with Mr Sinagra but said in his evidence, after some oscillation that mention was made of a "reasonable rate". In relation to the administration fee, Mr Ritchie said that it is common to charge fifty cents per tonne for administration costs, in this sort of work. Mr Ritchie also said that Mr Sinagra did stay at the Ritchies' premises for most of the two week or so period and used the facilities, and had meals. However, when questioned by Mr Sinagra, Mr Ritchie conceded that Mr Sinagra was on the road for much of the time during the period of the contract. He also accepted that he didn't mention any specific rate for the trailer hire, and did not specifically discuss any administration fee with Mr Sinagra.

9 Ultimately, the question in dispute is one of fact. I am not satisfied that it was an agreed term of the owner-driver contract between the parties that Mr Sinagra pay a trailer hire and an administration fee under the contract.

10 As mentioned earlier, given the conflict on the evidence, it is a question of the Tribunal's assessment of the credibility of those giving evidence. Mr Sinagra gave his evidence in a forthright and convincing fashion. On the other hand as I have already mentioned, aspects of Mr Ritchie's evidence were vague and uncertain. I accept that Mr Sinagra was approached by Mr Ritchie to assist with grain cartage in November 2013. I also accept that Mr Ritchie requested Mr Sinagra's assistance because he had lost a driver at short notice and needed help. It is entirely consistent with that factual background, that knowing that Mr Sinagra did not have at that time, a second trailer, that Mr Ritchie would offer him the use of one of the Ritchies' trailers. The fact that Mr Ritchie could not refer to any agreed rate for the trailer hire, points in my view, to the subsequent claim and deduction from monies paid to Mr Sinagra, as very much an after the event deduction.

11 Likewise, as to the administration fee, having preferred the evidence of Mr Sinagra, I do not accept that there was a term of the owner-driver contract that any administration fee was to be paid by Mr Sinagra. As I have already noted above, Mr Ritchie agreed that there was no discussion about this matter between himself and Mr Sinagra. There is no necessity to imply such a

term into the contract. Again in my view, the subsequent deduction from monies paid to Mr Sinagra, by the Ritchies, was an after the event deduction.

12 It is not open for a party to an owner-driver contract to unilaterally vary it after its commencement. There was no agreement between Mr Ritchie and Mr Sinagra for such deductions and therefore in my view, the Ritchies cannot rely upon the owner-driver contract to support their contentions.

13 That being so, as the contract did not support the deductions made from monies owed to Mr Sinagra, for the purposes of the Regulations, the only other basis on which such a deduction may be lawfully made is if it is made in accordance with s 10. Section 10 of the Regulations relevantly provides as follows:

> **10. Deductions must be authorised by the contract or this section**
>
> (1) A hirer must not deduct any amount from money payable by the hirer to an owner-driver under an owner-driver contract unless the deduction is authorised either by —
>
> (a) the contract; or
>
> (b) this section.
>
> (2) The deduction of an amount is authorised by this section if —
>
> (a) the amount represents —
>
> (i) a payment under an owner-driver contract that the owner-driver is liable to make, in accordance with section 9, for loss or damage incurred by the hirer as a result of a breach of contract or default (as defined in that section) on the part of the owner-driver; or
>
> (ii) the reasonable value of any service, benefit or thing that the hirer has provided or arranged to be provided to the owner-driver;
>
> and
>
> (b) the hirer has given written notice to the owner-driver, not less than 14 days before the deduction is made —
>
> (i) describing the liability or the service, benefit or thing; and
>
> (ii) stating the amount to be deducted, when or from what money payable the deduction will be made, and the basis on which the deduction has been calculated.

14 It is clear by s 10(2)(a)(ii) that a hirer may make a deduction of monies owed to an owner-driver for services, benefits or other matters, as long as the requirements of s 10(2)(b) are met. That requires that the hirer must give written notice to the owner-driver setting out the particulars of the deduction made. This is for the obvious reason that the owner-driver is given prior notification of any proposed deduction, and an opportunity to query any such deductions if there may be some dispute about it. That plainly did not occur in this case. Accordingly, no reliance can be placed on s 10 of the Regulations to support the deductions in this case. That being so, the deductions were neither supported by the contract nor the Regulations, and therefore were unlawful deductions made from monies owed to Mr Sinagra.

15 Accordingly, the Tribunal will order that the Ritchies pay to Mr Sinagra the sum claimed of $3,309.38 along with interest in the sum of $156.13 leading to a total sum of $3,465.51.

2014 WAIRC 01097

DISPUTE RE OUTSTANDING PAYMENTS

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-
	L.D RITCHIE & S.D RITCHIE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 3 OCTOBER 2014
FILE NO/S	RFT 5 OF 2014
CITATION NO.	2014 WAIRC 01097

Result	Application upheld
Representation	
Applicant	Mr P Sinagra and with him Ms J Sinagra
Respondents	Ms S Ritchie and with her Mr L Ritchie

Order

HAVING heard Mr P Sinagra and with him Ms J Sinagra on their own behalf and Ms S Ritchie and with her Mr L Ritchie on their own behalf the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders –

THAT the respondents pay to the applicant the sum of $3,309.38 plus interest pursuant to s 14 of the Owner-Drivers (Contracts and Disputes) Act 2007, in the sum of $156.13 within 21 days of the date of this order.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Domenico Princi Trading as Mullaoo Cleaning Services	Toll Transport Pty Ltd Trading as Toll-Ipec	Kenner C	RFT 16/2014	22/08/2014	Referral of dispute	Discontinued