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FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00962

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 22 OF 2016 GIVEN ON 19 JULY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00962
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER S J KENNER COMMISSIONER D J MATTHEWS
HEARD	:	TUESDAY, 18 OCTOBER 2016
DELIVERED	:	THURSDAY, 22 DECEMBER 2016
FILE NO.	:	FBA 8 OF 2016
BETWEEN	:	BRIAN JOHN NATHAN Appellant AND HEVBREN PTY LTD AS TRUSTEE OF THE ANNANDALE FAMILY TRUST T/AS LAGOON REALTY Respondent

ON APPEAL FROM:

Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Chief Commissioner P E Scott**
Citation	:	**[2016] WAIRC 00665; (2016) 96 WAIG 1312**
File Nos	:	**B 22 of 2016**

CatchWords	:	Industrial Law (WA) - Appeal against decision of Commission - Claim of contractual benefits - Appellant's claim for commissions for the sale of land - Implied term of appellant's contract requiring him to prove his work was the effective cause of the listing of property for sale - Principles entitling a real estate agent to commission considered - Turns on own facts
Legislation	:	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 49 *Real Estate and Business Agents Act 1978* (WA) s 60, s 60(1)(b), s 60(2) *Auctioneers and Agents Act 1971* (Qld) s 76(1)(c)
Result	:	Appeal dismissed

Representation:

Appellant	:	Mr P Mullally, as agent
Respondent	:	Mr I Curlewis (of counsel)
Solicitors:		
Respondent	:	Lavan Legal

Case(s) referred to in reasons:

Devries v Australian National Railways Commission [1993] HCA 78; (1993) 177 CLR 472

L J Hooker Ltd v Dominion Factors Pty Ltd [1963] SR (NSW) 146

L J Hooker Ltd v W J Adams Estates Pty Ltd [1977] HCA 13; (1977) 138 CLR 52

Luxor (Eastbourne) Ltd v Cooper [1941] AC 108

Moneywood Pty Ltd v Salamon Nominees Pty Ltd [2001] HCA 2; (2001) 202 CLR 351; (2001) 177 ALR 390

Reasons for Decision

SMITH AP:

The appeal

1 This is an appeal instituted under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) against a decision made by the Commission on 19 July 2016 dismissing application B 22 of 2016.

2 Application B 22 of 2016 was referred to the Commission by Brian John Nathan (the appellant) under s 29(1)(b)(ii) of the IR Act. The appellant was employed by Hevbren Pty Ltd as trustee of the Annandale Family Trust trading as Lagoon Realty (the respondent) as a full-time real estate sales representative from mid-October 2004 to July 2013. The appellant claims that he is owed $42,700 in commissions for the sale of 29 lots of land on grounds that he listed the lots for sale as part of a parcel of 31 lots.

3 The principal of the real estate agency operated by the respondent is Mr Brendon Annandale.

4 The terms of the appellant's contract of employment were oral. His remuneration was wholly by commission, to be earned on the following basis:

(a) 25% of the respondent's commission on the sale of a property which was listed by the appellant;

(b) 50% of the respondent's commission on the sale of a property which was both listed and sold by the appellant; and

(c) 25% of the respondent's commission on a property the appellant sold but which had been listed by the respondent.

5 The 29 lots of land formed part of a proposed sub-division of 31 vacant residential cottage lots in a development known as the Capricorn Esplanade listed for sale by Deloitte Touche Tohmatsu (Deloitte) as receivers and managers by entering into a selling agency agreement authorising Lagoon Realty to sell each of the 31 lots of land in late September 2012. Twenty-nine lots were sold by Mr Annandale while the appellant was employed. The appellant's claim is that he is entitled to 25% of the respondent's commission on the sale of each of the 29 lots as each of those lots were listed by him.

6 The lots became listed by the respondent for sale following an approach sometime in July or August 2012 to Mr Annandale by Mikael Boisen from Deloitte for a proposal to sell the lots as agent for Deloitte.

7 On 28 August 2012, Mr Boisen sent an email to Mr Annandale in which he asked Mr Annandale to provide a formal selling submission to sell the 31 proposed lots (exhibit R1, BA1, AB 56 - 58). In the email, Mr Boisen said that the submission should include at a minimum:

- Commission and fee structure
- Proposed listing price (per lot)
- Selling strategy (assuming the Completed Lots are all released at once)
- Proposed marketing mediums (and associated cost)
- Recent comparable sales you have made
- Suggested incentives (i.e. landscaping, cash back)
- Yanchep general market commentary
- Your view of the market's perception of buying off the plans
- A demonstrated understanding of building restrictions in Yanchep and particularly the Completed Lots
- Anything else you consider relevant.

8 On 3 September 2012, Mr Annandale sent by email to Mr Boisen a selling submission for the proposed 31 cottage lots (exhibit R1, BA2, AB 61 - 64). The selling submission comprised four pages in which Mr Annandale comprehensively set out:

(a) An assessment of the market for ocean view lots in the area.

(b) Proposed market mediums, including recommendations for aerial photography, internet, advertising, banner advertising and a large custom photo signboard.

9 In the submission, Mr Annandale referred to the agency's database of clients that could be contacted should they be appointed as the selling agent. He also addressed each of the matters requested by Mr Boisen. These were:

(a) In respect of commission and fee structure, he made an offer of a discounted selling fee of 2% of the selling price plus GST with an exclusive agency for an initial period of 180 days, renewable by mutual agreement for a further term if required. He also indicated that the respondent would be happy to allow conjunctional dealings with any other agent should they have a prospective buyer.

(b) A commencement date for a marketing program and proposed marketing and initial set up costs totalling an estimate of $9,700.

(c) In respect of proposed listing prices, Mr Annandale stated that to achieve sales within a reasonable timeframe and to meet valuation by banks on finance deals he saw the lots selling between $750 - $966 per square metre. He also stated that he was of the opinion they should be kept below $1,000 per square metre in order to achieve realistic expectations in today's market. He then set out a proposed listing price for each one of the lots by their lot number and size in square metres.

(d) A selling strategy was proposed to utilise a relatively low cost budget campaign, together with a small budget for classified advertising when titles had been issued.

(e) Incentives were proposed which included fencing, front yard landscaping package with automatic reticulation off mains to front only, Colorbond fencing to sides (not Timberlap) all co-ordinated with one neutral colour, together with front boundary fencing with small limestone walls and powder coated or galvanised upright steel with built-in letterboxes to provide a quality streetscape.

(f) Some general observations were made about the Yanchep market and the cost of blocks in other estates and the market that the Capricorn Esplanade should aim for.

(g) An assessment was provided about the ease it would be to sell to participants in the market off the plans.

(h) Observations were made about the understanding by the agency of restrictive covenants, building conditions, guidelines and selling results in Yanchep.

10 On the same day, Mr Annandale emailed the proposal to Mr Boisen, Mr Boisen sent Mr Annandale an email thanking him for the submission and asking for the submission to be resent in a word document or pdf format.

11 On 16 September 2012, Mr Annandale and his wife flew to China for a holiday. Mr Annandale did not return to Perth until 29 September 2012.

The evidence of the work carried out by the appellant in respect of the listing of the 31 lots at the Capricorn Esplanade at Yanchep

12 The appellant was the only witness who gave evidence in the proceedings at first instance. The respondent did, however, go into evidence by tendering of a number of emails and documents that comprised the selling agency agreement for the 31 lots (exhibit R1).

13 The appellant gave his evidence in part through a written statement which was signed by him on 20 June 2016 (exhibit A1). He also gave oral evidence. He has a hearing disability. The transcript of proceedings at first instance records that when asked questions in cross-examination, on occasions some questions had to be repeated to the appellant as he had difficulty hearing questions put by counsel.

14 The statements made by the appellant in his witness statement are material in this appeal as the Chief Commissioner found in her reasons for decision that the appellant made a number of statements when giving his evidence on oath orally in the witness box that was, in some respects, inconsistent with the matters stated by him in his witness statement.

15 In the appellant's witness statement, he made the following statements:

(a) Prior to Mr Annandale leaving to go overseas, Mr Annandale did not brief him on the proposal or tell him that he may receive a call from Deloitte.

(b) On or about 17 September 2012, Mr Boisen telephoned the office and he answered the call. Mr Boisen asked to speak to Mr Annandale. He explained that Mr Annandale was away on holidays in China and told Mr Boisen that he was a sales representative and was 'Brendon's right hand man'. He offered to give Mr Annandale's mobile number to Mr Boisen, but Mr Boisen said it was okay to speak with him. Mr Boisen explained that he had received the proposal sent by Mr Annandale and he was now looking at progressing the matter further. In this conversation, he discussed his experience selling land and told Mr Boisen he was very familiar with the Capricorn Estate land.

(c) He gave Mr Boisen his mobile number during this conversation. He then rang Mr Annandale and told him of the contact from Deloitte and asked whether he wished to deal with Mr Boisen, but Mr Annandale did not take that up. He (Mr Annandale) simply wished him good luck.

(d) Over the ensuing few days after the initial call from Mr Boisen, he had numerous telephone discussions with Mr Boisen about the lots. Mr Boisen told him he would receive a call from Caplan Real Estate in Queensland who were consultants to Deloitte. Mr Boisen discussed with him the advertising of the lots and the requirement of Deloitte that if Lagoon Realty got the listing then conjunctional sales with other local agents would be permitted. During these conversations, he says he won Mr Boisen's confidence and that Mr Boisen told him that no decision had been made about who to appoint and that he (Mr Boisen) was also in discussion with a rival of Lagoon Realty, Bloomfields.

(e) He received a telephone call from Caplan Real Estate, but says their ideas were quite unrealistic as they wanted to build a display home on the estate, but that was over the top as there were only 31 lots.

(f) Later in the week, probably on Thursday, 20 September 2012, he was asked to attend a meeting with a senior manager of Deloitte and Mr Boisen. He was invited to meet in the city, but as he was on his own, apart from an assistant property manager, he suggested that they come to the office of Lagoon Realty. In the end, they agreed on a telephone conference. He saw this as an opportunity to convince the senior manager of Deloitte that Lagoon Realty was the right business for the job, to expand on the proposal and to brain storm ideas for the project.

(g) During the telephone conference, Mr Boisen and the senior manager were very interested in the correct pricing for the lots and the timeline for the sales. He explained that Lagoon Realty were well placed for land sales and the lots should all be sold in a period of 90 to 120 days. He also explained that the pricing could probably be rounded up. He also told them in the conference call that he had strong relationships and contacts in the building industry. He informed them that the lots had been listed with Century 21 for at least two years and they needed a local agent and Lagoon Realty was a leading local agent selling land in Yanchep and that they would be making a wise decision to choose Lagoon Realty.

(h) At the conclusion of the conference call, the senior manager thanked him for his presentation and knowledge and said that they would be in touch when a decision was made.

(i) The following day, he received a telephone call from Mr Boisen requesting that he prepare and send to Deloitte a completed agency agreement with respect to the lots. He did this and signed the document on behalf of the respondent as the selling real estate agent.

16 In emails tendered by the respondent in exhibit R1, it is recorded that the following events occurred:

(a) On 20 September 2012 at 6.18 am, Mr Boisen sent an email to the appellant in which he stated that (exhibit R1, BA4, AB 66):

> Here are my contact details. I look forward to receiving the agency agreement (incorporating all the details of your selling submission) once you have spoken to Brendon.
>
> Any questions, please let me know.

(b) Later that day at 2.29 pm, the appellant sent an email to Mr Annandale in which he stated (exhibit R1, BA5, AB 67):

> Hi Mate, we got the blocks Michale wants to do paperwork asap please advise where proposal is so I can do paperwork or call ASAP regards Brian

(c) At 2.41 pm on 20 September 2012, the appellant sent another email to Mr Annandale in which he stated (exhibit R1, BA6, AB 68):

> Hi Mate, please confirm, should I write up 4 listings for the 4 lots and put in the advertising costs ETC and send to Mikael regards Brian
>
> or do you want me to email you the paperwork to sign off please advise

(d) At 4.46 pm on 20 September 2012, the appellant sent an email to Mr Boisen in which he attached a listing agreement for the 31 proposed lots at Capricorn Esplanade Yanchep for signing by Deloitte (exhibit R1, BA7, AB 69).

17 Although the attached proposed listing agreement was sent by the appellant to Mr Boisen on 20 September 2012, the appellant dated the agreement (which he signed on behalf of Lagoon Realty) 21 September 2012. Importantly, the proposed listing agreement reflected all of the essential terms set out in the proposal prepared by Mr Annandale, including the initial listing prices, the agent's selling fee and marketing charges and expenses of $9,700. Also, the appellant included a handwritten note on the proposed agreement that, 'NB Lagoon Realty agree to offer conjunctional selling terms to the other local agents as per normal'.

18 On 25 September 2012, Mr Boisen sent the appellant an email in which he informed the appellant that he may be contacted by a number of sales and marketing agents who will ask questions about the development. Mr Boisen also said in the email (exhibit R1, BA9, AB 74):

> As we will be employing an external agency in due course to assist with the sales and marketing campaign, we ask that you attend to their questions and, if needed, ask them to call back again when Brendon has returned from leave.

19 On 27 September 2012, Mr Boisen returned by email a signed copy of the agency agreement. The only substantial alteration to the document was the inclusion of a schedule A containing additional terms of appointment of agent comprising three pages which had been prepared by solicitors acting for Deloitte (exhibit R1, BA10, AB 75 - 81).

20 On 30 September 2012, Mr Annandale sent an email to Mr Boisen in which he stated (exhibit R1, BA12, AB 82):

> Good Morning Mikael & Clayton
>
> I have returned from my vacation in China.
>
> I am very pleased that Lagoon Realty have been selected to sell the proposed 31 Capricorn Lots and our formal appointment via our Selling Agency Agreement has been signed by the parties.
>
> Brian Nathan has been the point of Contact in my absence. I would ask that all future communication comes now to me by email to brendon@lagoonrealty.com.au or my mobile 0414 474 476.

I understand Lavan Legal are preparing the Offer document and we can expect the same early this week.

Lot signage has been ordered for the individual lots to help direct buyers to the location of the proposed Lots.

I now presume we can commence advertising.

Looking forward to working with Deloitte's on this exciting project.

21 When the appellant gave oral evidence he said that he had not seen the written proposal prepared by Mr Annandale until after Mr Boisen asked him to write up the listing agreement. The appellant agreed that he wrote up the terms of the proposed agreement in accordance with the terms set out in the proposal, including a handwritten note on the agreement that if other agents sell any of the 31 lots the payment of the rate of commission would be the same as the commission payable to Lagoon Realty.

22 The appellant maintained in his evidence that he received a telephone call from Mr Boisen on 17 September 2012. He described this telephone call to be 'a cold call' which he said was very delicate for him to handle because he had not been briefed on the proposal that had been put to Deloitte. He also said that he discussed pricing and marketing with Mr Boisen. However, he maintained throughout all of his discussions with Deloitte he was unaware that Mr Annandale had in the selling submission provided proposed listing prices for each of the proposed lots or the amount allocated for advertising.

23 The appellant said at the time he first received a telephone call from Mr Boisen he was in negotiations with a builder, 101 Constructions, about ocean view blocks and after he spoke to Mr Boisen he emailed that enquiry to Mr Boisen straight away to give Mr Boisen an example as to the type of enquiries that Lagoon Realty receive.

24 The appellant also said that over four days he had about six or eight telephone calls with Deloitte which included the teleconference. When asked what triggered his entitlement to a commission, he said that 'signing the listing form was a good start', but then said that the trigger was engaging in the conference call with Mr Boisen and two other senior managers from Deloitte. In particular, 'he felt that' his communication with them, his boldness during a very long exhaustive teleconference during which he spoke about his history with a previous attempt to sell blocks in the Capricorn Estate, the fact that the property had been on the market in excess of two years with Century 21 Real Estate (which was not a local agent), how good Lagoon Realty were at selling beach blocks and that he had a reputation for selling ocean view blocks in the area. He also said that the services of Lagoon Realty got the listing 'based on our capacity as a sales force, the location of the office, our capacity to sell … coastal real estate, and two very confident - extremely confident sales people'.

25 Although the appellant stated when giving oral evidence that he was not aware that Mr Annandale had priced each of the lots, he maintained that he discussed pricing of each of the lots with Mr Boisen. He said he told Mr Boisen that he thought that the lots were too cheap. However, the appellant conceded that the pricing of the lots did not change until after Lagoon Realty had secured the agency listing. Ultimately the pricing for each of the lots were rounded up after three valuers had valued the lots after the selling agency agreement had been executed by both parties.

26 Once the appellant was advised by Mr Boisen that they had obtained the listing, the appellant said when giving oral evidence that he telephoned Mr Annandale in China and told him that they had the lots and asked him where was the proposal. He also said that when he spoke to Mr Annandale it was in the evening that Mr Annandale was having dinner in Macau. When asked about this telephone call, it was pointed out to the appellant that he had received an email on 20 September 2012 from Mr Boisen at 6.18 am to say that Deloitte would enter into a contract with Lagoon Realty to sell the lots as agent. When questioned further about this issue, the appellant was unable to recollect whether he spoke to Mr Annandale and told him that they were getting close (to obtaining the authority to sell the lots) or that he telephoned him to tell him that they had secured the listing (ts 41).

Reasons for decision at first instance

27 The learned Chief Commissioner applied the principles applicable to the construction of a real estate agent's commission in circumstances where the real estate agent sells a property. The learned Chief Commissioner referred to the fact that the appellant's contract of employment entitled him to commission on the sale of a property which was listed by him. The learned Chief Commissioner found the principles that apply to entitlement to commission on sales made by a real estate agent were set out in ***L J Hooker Ltd v W J Adams Estates Pty Ltd*** [1977] HCA 13; (1977) 138 CLR 52 and referred to the judgment of Barwick CJ wherein his Honour applied the principle that the entitlement to commission on a sale of real property arises when the agent has been the effective cause of the sale.

28 Applying the test enunciated by Barwick CJ in ***L J Hooker Ltd v W J Adams Estates Pty Ltd***, by applying references to 'sales' as references to 'listings', the learned Chief Commissioner posed the question whether the appellant was the effective cause of the listing, did he introduce the client to the listing, did he really bring about the listing?

29 The learned Chief Commissioner then went on to assess the reliability of the evidence given by the appellant and found his oral evidence was inconsistent with the documentary evidence and certain aspects of his oral evidence were inconsistent with the matters stated by him in his witness statement. In these circumstances, the learned Chief Commissioner was unable to find that the appellant's work was the cause of the listings and dismissed the application. In making the finding that she was unable to rely upon the appellant's evidence, the learned Chief Commissioner took into account:

(a) The appellant bears the onus of proof.

(b) The appellant does not claim to have brought about the listing by introducing the client.

(c) The appellant signed the listing form but she was not satisfied that that was the cause of the listing.

(d) The appellant's hearing difficulties. Those difficulties made his comprehension of some of the questions in cross-examination problematic. However, he was intent on telling his sales story rather than answering the questions.

(e) The passage of time has caused some confusion.

(f) In his witness statement, the appellant said that Mr Boisen contacted him on 17 September 2012 and stated that in the first discussion he had with Mr Boisen, Mr Boisen referred to having received the proposal (prepared by Mr Annandale). Yet, in his oral evidence, both in examination-in-chief and in cross-examination, the appellant said he thought that Mr Boisen's phone call was a 'cold call' and he was not aware of Mr Annandale having previous dealings with Mr Boisen about the lots or that Mr Annandale had sent off a proposal. He also said he was not aware of the proposal at all until sometime 'further down the track'.

(g) The appellant was most adamant about his evidence but when challenged said he was confused about some of the timing. However, not only was his evidence inconsistent within itself, it was also inconsistent with documentary evidence regarding such things as whether he had engaged in email communications with Mr Boisen between 17 and 19 September 2012. He was quite certain that he had. However, Mr Boisen's email of 20 September 2012 makes a point of providing his contact details, which strongly suggests that Mr Boisen had not previously provided those email communication details and that they had not previously communicated by email.

(h) There was inconsistency about whether the appellant had telephoned Mr Annandale, either to say they were very close to securing the listing or that they had won the listing. This is further added to by the fact that the appellant appeared to suggest that he sent an email which was in the same terms as the telephone call that he had made to say that they had won the listings.

(i) Most significantly, the listing agreement form which the appellant sent to Deloitte was solely based upon Mr Annandale's proposal. The terms of this proposal were what Mr Boisen instructed the appellant to include, and he did so. None of the matters which the appellant said he discussed with Mr Boisen were included in that document. Deloitte sent back the document prepared by the appellant on direction from Mr Boisen, but it contained some changes to the document itself and added conditions sought by Deloitte

30 In all the circumstances, the learned Chief Commissioner was unable to be satisfied about what work the appellant did to secure the listing, other than prepare the paperwork as directed and thus was unable to conclude that the appellant was responsible for the respondent obtaining the listing. The learned Chief Commissioner then found that the evidence pointed strongly to Mr Annandale's work being the cause of the listing and found that it may be that the appellant's telephone and email communications with Deloitte assisted in some way, but she was unable to conclude what those communications were, what assistance, if any, they might have been and whether they were in any way a trigger for the listing, based on her concerns regarding the reliability of the evidence.

The grounds of appeal

31 The grounds of appeal are as follows:

GROUND A: THE APPELLANT WAS NOT THE CAUSE OF THE LISTING

1. The learned Chief Commissioner erred in fact and in law when she ruled that the appellant was not the cause of the listing of the blocks the subject of his application below:

PARTICULARS

1.1 The appellant signed and submitted the Selling Agency Agreement to the vendor;

1.2 The vendor accepted the Selling Agency Agreement submitted by the appellant;

1.3 As a matter of law the appellant secured the legal document which the respondent required by the operation of the *Real Estate and Business Agent's* [sic] *Act 1978*: see s60

GROUND B: APPLICATION OF THE TERMS OF THE EMPLOYMENT CONTRACT

2. The learned Chief Commissioner erred in fact and in law when she failed to apply the terms of the appellant's employment contract to his claim.

PARTICULARS

2.1 The relevant term of the employment contract was set out in paragraph 4 of the Further and Better Particulars and relevantly provided: *The applicant's remuneration was wholly by the way of commission on the following basis:*

4.1 at the rate of 25% of the respondent's commission on the sale of a properly which was listed by the applicant

2.2 The term ought to have been given its ordinary and natural meaning namely that the appellant had listed the blocks;

2.3 The appellant was entitled to his remuneration if he listed the blocks.

GROUND C: NOT RESPONSIBLE FOR OBTAINING THE LISTING

3. The learned Chief Commissioner erred in fact and in law when she found that she was unable to conclude that the appellant was responsible for obtaining the listing of the blocks the subject of his application.

PARTICULARS

3.1 The employment contract did not require the appellant to be responsible for obtaining the listing;

3.2 The relevant term of the employment contract required the appellant to make the listing;

3.3 The evidence was overwhelmingly in support of the appellant making the listing when he obtained the vendor's acceptance of the Selling Agency Agreement.

The submissions made on behalf of the appellant

32 In ground A of the grounds of appeal, the appellant challenges the finding made by the Chief Commissioner that he was not the cause of the listing of the lots the subject of his application. It is pointed out on behalf of the appellant that he was a full-time employee for the respondent and was required to be in attendance at the office during normal office hours and was responsible for generating listings and selling properties already listed for sale by the respondent.

33 Importantly, the principal of the business, Mr Annandale, was away in China between 16 and 29 September 2012 during which time the work the appellant carried out was the effective cause of listing of the 29 lots, the subject of the claim.

34 It is argued that the appellant's work, whatever its quantity, it was significant qualitatively as it achieved the legal requirements for the respondent to act on behalf of the vendor (Deloitte) and to ultimately sell the lots which resulted in earning commissions for the business. It is said that without the work of the appellant in September 2012, the respondent would not have been in a position to sell the lots.

35 In support of this argument, the appellant relies upon the effect of s 60 of the *Real Estate and Business Agents Act 1978* (WA). Section 60(1)(b) of the *Real Estate and Business Agents Act* provides that a licenced real estate agent is not entitled to receive any commission unless it or he or she has a valid appointment to act in writing signed by the person for whom the services are to be rendered. It is argued that pursuant to s 60, the respondent could not offer for sale, nor could it lawfully expect to earn a commission from offering for sale the 31 lots in the Capricorn Esplanade, until it had a written authority to sell. Thus, there was no listing validly at law until Deloitte provided an authority in writing to Lagoon Realty to act as agent.

36 Also in support of this argument, the appellant relies upon the observations of Gibbs J in ***L J Hooker Ltd v W J Adams Estates Pty Ltd*** where his Honour said (66 - 67):

> When an agent is employed to sell a property, or to find a buyer, he does not earn his commission simply by finding someone who is ready, willing and able to buy, or who offers to buy. Nothwithstanding [sic] what was said in an earlier decision of this Court, *Macnamara* v. *Martin* ((1908) 7 C.L.R. 699), it has become clear since *Luxor (Eastbourne) Ltd.* v. *Cooper* ([1941] A.C. 108) that in such a case it is at least necessary that a binding contract of sale should have been executed: see *Luxor (Eastboume) Ltd.* v. *Cooper* ([1941] A.C., at pp. 126, 129, 154); *Jones* v. *Lowe* ([1945] K.B. 73); *Fowler* v. *Bratt* ([1950] 2 K.B. 96); *McCallum* v. *Hicks* ([1950] 2 K.B. 271).

37 Thus, it is argued that the triggering for the payment of commission on each of the 29 lots was the preparation and execution of the listing agreement by the appellant and it matters little what work was done by Mr Annandale before he left to go overseas because that work was worthless without a written authority that complied with the requirements of s 60 of the *Real Estate and Business Agents Act*. It is argued that however unsatisfactory the evidence of the appellant was at first instance it cannot be disputed that while Mr Annandale was away overseas that the appellant dealt with Mr Boisen. The emails independently verify that to be the case and the documents tendered into evidence show that he prepared the legal requirements for the triggering for payment of commission by ensuring s 60 of the *Real Estate and Business Agents Act* was complied with. Thus, the legal effect of interaction between the appellant and Mr Boisen, the preparation of the listing agreement, the communication of the documentation to Deloitte, its execution by Deloitte and return of the completed listing agreement to the respondent all occurred during the period when the appellant was on his own effectively running the business of the respondent insofar as sales and listings were concerned. The authorities make it clear an agent can earn a substantial commission for very little exertion: ***Luxor (Eastbourne) Ltd v Cooper*** [1941] AC 108, 125.

38 In ground B of the grounds of appeal, it is argued that the learned Chief Commissioner erred in fact and in law when she failed to apply the terms of the appellant's employment contract to his claim. It is put that the term of the contract, that the appellant's remuneration was wholly by way of commission at the rate of 25% of the respondent's commission on the sale of a property listed by the appellant, ought to be given its ordinary and natural meaning; that is where the appellant listed land for sale he was entitled to the remuneration as provided for in his contract. In support of this ground of appeal, the submissions put on behalf of the appellant in support of ground A of the appeal are repeated. It is also pointed out that it was not an agreed term that to be eligible for a listing commission the appellant would have had to introduce to the respondent the client whose property was subsequently listed and sold by the respondent.

39 In ground C of the grounds of appeal, it is argued that the learned Chief Commissioner erred in fact and in law when she found that she was unable to conclude that the appellant was responsible for obtaining the listing of the lots the subject of the application. In support of this argument, it is argued that the terms of the appellant's contract did not require him to be responsible for the listing; the terms of his contract simply required him to list the property to enable the entitlement to be triggered.

40 In addition to the matters raised on behalf of the appellant in respect of ground A, an argument is raised that there should be very liberal interpretation of the terms of the appellant's oral contract of employment which is said to be in breach of cl 16 of the *Real Estate Industry Award 2010* (Cth). It is argued that pursuant to cl 16 of the terms of that award, the respondent was required to commit to writing the terms of the appellant's employment contract and that in the absence of the terms of the appellant's contract being in writing, the oral terms should be legally construed liberally as the provisions of the modern award are intended to protect the interests of employees of real estate agents such as the appellant.

Conclusion

41 The learned Chief Commissioner's findings on the credibility of the appellant are not substantially challenged in this appeal.

42 If a finding of fact at first instance depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown the finder of fact has failed to use or has palpably misused his or her advantage in hearing the witness or has acted on evidence that was inconsistent with the facts incontrovertibly established by the evidence or which was glaring improbable: ***Devries v Australian National Railways Commission*** [1993] HCA 78; (1993) 177 CLR 472, 479.

43 In light of the inconsistencies between some of the matters stated in the appellant's witness statement, his oral evidence and email correspondence, it is clear that the learned Chief Commissioner's finding that the appellant's evidence was unreliable cannot be challenged.

44 Consequently, the only reliable and relevant evidence of the work carried out by the appellant before the learned Chief Commissioner is that the appellant prepared and sent by email to Mr Boisen the selling agreement (which reflected the terms proposed by Mr Annandale in his selling submission dated 3 September 2012) for execution by Deloitte as receivers and managers for Yanchep Developments Pty Ltd (Receivers and Managers Appointed) ACN 134 225 835.

45 It is common ground that Mr Annandale was the holder of a triennial certificate and the appellant was engaged as a real estate representative licensed as such under the *Real Estate and Business Agents Act*.

46 The requirements of s 60 of the *Real Estate and Business Agents Act* do not assist the appellant's claim for commission. Section 60 of the *Real Estate and Business Agents Act* renders void an appointment to act as an agent a licensed real estate agent who holds a triennial certificate and disentitles that agent to any valuable consideration in respect of services in respect of the sale of real property if an appointment to act is not in writing containing terms prescribed in s 60(2) and signed by the client.

47 The effect of s 60 is that if the formalities are complied with in respect of land the subject of a complying written agreement a licenced real estate agent who holds a triennial certificate is entitled to payment of commission as the principal and if a licenced real estate agent sells the land in question, the real estate representative subject to his or her express or implied terms of contract is entitled to payment of commission. In this matter it is an implied term that to be entitled to commission the work and conduct of the respondent must be the effective cause of a listing.

48 Whilst the argument that until a contract of agency for the sale of land is executed in writing pursuant to s 60 of the *Real Estate and Business Agents Act* merely preparing a selling agreement which provides for terms of contract that have been proposed by another party (in this case Mr Annandale) is not sufficient to raise a right to be paid commission as a listing agent unless it can be found there is an effective causal relationship between the work of the appellant and the agreement by Deloitte to list the 31 cottage lots for sale by Lagoon Realty.

49 In ***Moneywood Pty Ltd v Salamon Nominees Pty Ltd*** [2001] HCA 2; (2001) 202 CLR 351; (2001) 177 ALR 390, the High Court considered the effect of a legislative provision that was similar to s 60 of the *Real Estate and Business Agents Act*. Section 76(1)(c) of the *Auctioneers and Agents Act 1971* (Qld) provided:

> No person shall be entitled to sue for or recover or retain any fees, charges, commission, reward, or other remuneration for or in respect of any transaction as an auctioneer, a real estate agent, a commercial agent, or a motor dealer, unless -
>
> (c) the engagement or appointment to act as ... real estate agent ... in respect of such transaction is in writing signed by the person to be charged with such ... commission ... or the person's agent or representative ...

50 However, compliance with s 76(1)(c) of the *Auctioneers and Agents Act 1971* in ***Moneywood Pty Ltd*** did not absolve the appellant from satisfying the court that its conduct was the 'effective cause' of the sale of part of a parcel of land. Justice Gummow, after considering the observations of Jacobs J in ***L J Hooker Ltd v W J Adams Estates Pty Ltd***, found to secure an entitlement to commission where two agents separately introduce a purchase, the essential issue is whether the agent claiming a commission brought about a state of affairs giving rise to the contractual right to the commission [86].

51 'Effective cause' is not the same as 'exclusive cause'. In ***L J Hooker Ltd v W J Adams Estates Pty Ltd***, Jacobs J explained what is meant by the requirement of 'effective cause' in the law of contract which entitles a real estate agent to commission. At (86) he observed:

> The inquiry is a factual one and it probably does not matter in the long run whether the definite or indefinite pronoun is used before the words 'effective cause'. Thus in *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* ([1910] A.C. 614, at p. 625) Lord Atkinson used the phrases 'the effective cause' and 'an effective cause' without distinction between them. In almost any factual situation a result will have more than one cause and if there could only be one effective cause in relation to a sale within the meaning of the implication, then there are plenty of events in this case which would have strong claims for the title in competition with the appellant's actions. 'Effective cause' means more than simply 'cause'. The inquiry is whether the actions of the agent really brought about the relation of buyer and seller and it is seldom conclusive that there were other events which couuld [sic] each be described as a cause of the ensuing sale. The factual inquiry is whether a sale is really brought about by the act of the agent: *Green* v. *Bartlett* ((1863) 14 C.B. (N.S.) 681, at p. 685 [143 E.R. 613, at p. 614]) quoted in *Burchell's Case* ([1910] A.C., at p. 624).

52 In ***L J Hooker Ltd v Dominion Factors Pty Ltd*** [1963] SR (NSW) 146, Sugerman J raised the possibility that two or more agents who have taken part in a series of negotiations can claim that what each has done has been an efficient cause of sale (149). Justice Walsh (150) and Else-Mitchell J (151) made similar observations.

53 In ***L J Hooker Ltd v W J Adams Estates Pty Ltd***, Barwick CJ also considered whether two agents could be entitled to commission and went on to consider what was said in ***L J Hooker Ltd v Dominion Factors Pty Ltd*** and indicated that a case of two agents being entitled to commission may be unusual but not inconceivable. At (60 - 61) Barwick CJ said:

> The case of *L. J. Hooker Ltd.* v. *Dominion Factors Pty. Ltd.* ((1963) 63 S.R. (N.S.W.) 146) was much relied upon by counsel for the appellant. He claimed that the case decided that it was possible for two agents each to be entitled to full commission in respect of a sale of a piece of real estate. The present is not a case in which more than one agent claims commission. But the appellant seeks to draw some relevant principle from the case. I would agree that it is better to speak of the basis of the agent's entitlement to commission being that he is an effective cause of the sale. Where the performance of the agent's obligation is based upon his introduction of the property to the purchaser or of the purchaser to the vendor I have some difficulty in conceiving how two agents in relation to a sale of the whole of a property to a single

> purchaser should at an identical time introduce the property to the purchaser or the purchaser to the vendor. I would have thought that in the ordinary course of things, one introduction would have preceded the other, and in that case the efforts of the second agent on the scene might well be thought not to have been causal of the sale. But, if the case can be made out that an agent without introducing the property to the purchaser or the purchaser to the vendor, none the less causally assists in bringing about the sale, I suppose it is conceivable that two agents may each establish his right to a full commission: one, it may be, through the introduction of the purchaser to the property or of the purchaser to the vendor and the other by actions which are properly held to be an effective cause of the sale.

54 Justice Jacobs in ***L J Hooker Ltd v W J Adams Estates Pty Ltd*** also made a similar observation and considered the prospect of two agents being the effective cause of sale as not a matter of generalisation. At (87) his Honour said:

> That rare case, if it exists at all, can be left until it arises. If and when it does, I do not think that it will be simply solved by seeking to distinguish between an effective cause and the effective cause of a sale. I do not find it necessary to determine whether certain dicta in *L. J. Hooker Ltd.* v. *Dominion Factors Pty. Ltd.* ((1963) 63 S.R. (N.S.W.) 146) are correct.

55 Consequently, each case will turn on its own facts. Thus, whether an agent was the effective cause of a transaction is a question of fact: ***L J Hooker Ltd v W J Adams Estates Pty Ltd*** (68) (Gibbs J). This principle also applies where the facts reveal more than one agent has carried out work in relation to securing a sale or listing of a property.

56 Some efforts of a real estate agent may go unrewarded even when an agent has not been unconnected with the occurrence of a sale. Justice Stephen made this point in ***L J Hooker Ltd v W J Adams Estates Pty Ltd*** and then went on to observe (78):

> Rightly or wrongly the law, as it has evolved, has made the earning of an agreed commission an all or nothing affair, on the one hand denying to agents any reward despite substantial labour on their part and on the other handsomely rewarding agents who with little effort manage to effect a sale. As Lord Russell of Killowen said in *Luxor (Eastbourne) Ltd.* v. *Cooper*, 'The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion' ([1941] A.C., at p. 125). The law has seized upon their success or failure in bringing about a sale as the sole criterion of reward and rates of commission have no doubt come to reflect this state of affairs. To adopt unduly extended concepts of effective cause in an individual endeavour to do what may appear to be justice in a particular case not only disregards the settled approach of the law in this field but may, by its effect as a precedent, disrupt the existing pattern of acceptable scales of reward for services rendered by estate agents.

57 Whilst the appellant did not introduce Deloitte to Lagoon Realty, introduction of a client is not sufficient of itself to establish 'effective cause'. As Kirby J in ***Moneywood Pty Ltd*** explained [125]:

> Introduction is necessary because, without it, no completed transaction will usually be possible. But it is insufficient because (as the decided cases repeatedly demonstrate) many transactions fail. The purchaser who is introduced may be willing, but not able, to complete the contemplated transaction (*L J Hooker* (1977) 138 CLR 52 at 67. As Gibbs J there points out, in some jurisdictions it had been held that 'it is enough . . . that a binding contract has been entered into as a result of the agency, even though the purchaser subsequently proves unable to complete it'; *Scott v Willmore* & *Randell* [1949] VLR 113; *Latter v Parsons* (1906) 26 NZLR 645; *Manns v Bradley* [1960] NZLR 586. In Queensland, on the other hand, 'it has been held that the agent is not entitled to commission unless the purchaser who signed the contract was ready, willing and able to complete it'; *Pettigrew v Klumpp* [1942] St R Qd 131; *Hill v Davidson* [1950] St R Qd 31. In *Anderson v Densley* (1953) 90 CLR 460 at 467, this Court effectively resolved this dispute by holding that the commission only becomes payable if the sale is completed). Into the failure of one transaction will often step other agents with the same principals but with access to funding that cures the purchaser's previous inability to complete the transaction (cf *Blocksidge and Ferguson Ltd v Campbell* [1947] St R Qd 22; *Wyatt v Ball* [1955] St R Qd 515; *Rasmussen & Russo Pty Ltd v Gaviglio* [1982] Qd R 571 at 580; *Bradley v Adams* [1989] 1 Qd R 256 at 259). When this happens, such agents will commonly stake their own claims to commission. This will then oblige courts, in resolving disputed claims, to determine the contested issues of causation which such claims present (*John D Wood & Co v Dantata* [1987] 2 EGLR 23 at 25 applying Reynolds, *Bowstead on Agency*, 15th ed (1985), p 230).

58 The appellant would be entitled to commission if the agreement by Deloitte was in fact secured by his efforts. Put another way, was the conduct of the appellant in fact the effective cause of the agreement by Deloitte to list the lots for sale by Lagoon Realty?

59 In this matter, there was no direct evidence before the learned Chief Commissioner of what was in the mind of Mr Boisen or any other employee of Deloitte who made the decision to list the lots for sale by Lagoon Realty. In particular, there was no reliable direct evidence of why Deloitte chose to enter into a listing agreement with the respondent.

60 In circumstances where the only reliable evidence before the learned Chief Commissioner was a listing agreement prepared by and signed by the appellant in which all material terms reflected matters proposed by Mr Annandale, it is not open to find that the learned Chief Commissioner erred in fact or in law in finding in effect that the appellant failed to prove that his work was the cause of the listing of the lots.

61 Nor do I agree that cl 16 of the *Real Estate Industry Award 2010* assists the appellant's case. This provision of the award is not relevant to the construction of the terms of his contract of employment. Firstly, there is no dispute about the terms entitling the appellant to commission. Secondly, the obligation created by cl 16 of the award to enter into a written agreement setting out the terms of a commission-only basis of remuneration, other than the specification of a minimum rate to be paid to a commission-only employee of 35% of the employer's net commission in cl 16.5, does not raise any matter that is relevant to the construction of terms of the appellant's contract of employment. It is not argued that the minimum rate specified in cl 16.5 is relevant to the rate claimed by the appellant pursuant to the oral terms of contract. Thirdly, cl 16 may not create a retrospective obligation as the award had not come into effect when the appellant commenced employment as a real estate representative with the respondent.

62 For these reasons, I am not satisfied any of the grounds of appeal have been made out and I am of the opinion that an order should be made to dismiss the appeal.

KENNER ASC:

63 In this appeal, the appellant maintained that he listed 29 lots of residential land for sale at the "Capricorn Esplanade" in Yanchep, as an employed real estate representative of the respondent. At first instance he claimed $42,700 in commissions said to be owed to him under the terms of his contract of employment. The respondent maintained that it was the principal of the firm, Mr Annandale, who was the effective cause of the listing of the lots. This was said to arise as a consequence of a detailed proposal for the sale of the 31 lot parcel of land prepared by Mr Annandale and submitted to Deloitte Touche Tohmatsu, the accounting firm appointed as Receiver and Manager of the development. The Commission at first instance found in favour of the respondent.

64 For the reasons given by Smith AP, which I have had the opportunity of reading in draft, the appeal should be dismissed. The essential question arising on the appeal was whether the appellant was the "effective cause of the listing" for the purposes of his contract of employment with the respondent. The relevant principles are set out in the decision of the High Court in *LJ Hooker Ltd v WJ Adams Estates Pty Ltd* [1977] HCA 13; (1997) 138 CLR 52. It was not contended by the appellant that those principles did not apply in the present circumstances. That being the case and those principles not being satisfied, the appellant has not established that he was the effective cause of the listing, as he maintained.

MATTHEWS C:

65 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and agree that an order should be made to dismiss the appeal.

2016 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN JOHN NATHAN
	APPELLANT
	-and-
	HEVBREN PTY LTD AS TRUSTEE OF THE ANNANDALE FAMILY TRUST T/AS LAGOON REALTY
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 22 DECEMBER 2016
FILE NO.	FBA 8 OF 2016
CITATION NO.	2016 WAIRC 00963

Result	Order issued
Appearances	
Appellant	Mr P Mullally, as agent
Respondent	Mr I Curlewis (of counsel)

Order

This appeal having come on for hearing before the Full Bench on Tuesday, 18 October 2016, and having heard Mr P Mullally, as agent, on behalf of the appellant and Mr I Curlewis (of counsel) on behalf of the respondent, and reasons for decision having been delivered on Thursday, 22 December 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2016 WAIRC 00941

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 188 OF 2015 GIVEN ON 27 APRIL 2016 AND APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 188 OF 2015 GIVEN ON 21 APRIL 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00941
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT ACTING SENIOR COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 17 AUGUST 2016; MONDAY 19 SEPTEMBER 2016
DELIVERED	:	TUESDAY, 22 DECEMBER 2016
FILE NOS	:	FBA 3 OF 2016 AND FBA 4 OF 2016
BETWEEN	:	MARK DARREN RICHARDS
		Appellant
		AND
		GB & G NICOLETTI
		Respondents

ON APPEAL FROM:

Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Chief Commissioner A R Beech**
Citations	:	**[2016] WAIRC 00248; (2016) 96 WAIG 504 and [2016] WAIRC 00240; (2016) 96 WAIG 504**
File Nos	:	**U 188 of 2015 and B 188 of 2015**

CatchWords	:	Industrial Law (WA) - Appeals against decisions of Commission - Declaration made that employee was unfairly dismissed and order for compensation for loss and injury made - Order for quantum of compensation for injury varied - Principles regarding assessment of compensation considered - Claim of contractual benefits for pay in lieu of reasonable notice - Whether an implied term to give reasonable notice is a term implied in law or in fact considered - The existence of a notice provision in s 117(2) of the *Fair Work Act 2009* (Cth) excludes the implication of a term in the contract of employment to give reasonable notice
Legislation	:	*Industrial Relations Act 1979* (WA) s 23(7)(c), s 23A, s 23A(6), s 23A(7)(b), s 23A(7)(c), s 26(1)(a), s 26(1)(c), s 26(1)(d), s 29(1)(b)(i), s 49(2) *Residential Tenancies Act 1987* (WA) *Industrial Relations Act 1984* (TAS) s 46, s 47(2) *Fair Work Act 1994* (SA) *Acts Interpretation Act 1901* (Cth) s 15AB, s 15AB(1), s 15AB(1)(a), s 15AB(2)(d) *Fair Work Act 2009* (Cth) s 26, s 117, s 117(2), s 117(2)(a), s 117(3), s 340(1)(a)(i)pt 6-3 div 3, s 758, s 759, s 760, s 761, s 762 *Industrial Relations Act 1988* (Cth) s 170CA(1), s 170DB, s 170DB(1), s 170DB(2), s 170HA, sch 10 *Industrial Relations Reform Act 1993* (Cth) s 21 *Judiciary Act 1903* (Cth) s 78B *Workplace Relations Act 1996* (Cth) s 170CM, s 170CM(1), s 170CM(2), s 661, sch 10 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 5 Item 1 *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) Iterm 10 of sch 6 *Australian Constitution* s 109
Result	:	FBA 3 of 2016 - Upheld FBA 4 of 2016 - Dismissed

Representation:

Appellant	:	Mr G McCorry, as agent
Respondents	:	Mr C J Graham (of counsel) on 17 August 2016 and Mr S R Sirett (of counsel) on 19 September 2016
Solicitors:		
Respondents	:	Borrello Graham

Case(s) referred to in reasons:

Anthony & Sons Pty Ltd v Fowler [2005] WAIRC 01744; (2005) 85 WAIG 1899

Australian Coal and Shale Employees' Federation v Commonwealth (1953) 94 CLR 621

Australian National Hotels Pty Ltd v Jager [2000] TASSC 43; (2000) 9 TASR 153

AWI Administration Services Pty Ltd v Birnie [2001] WAIRC 04015; (2001) 81 WAIG 2849

Bognar v Merck Sharp & Dohme (Australia) Pty Ltd [2008] FMCA 571

Bone Densitometry Australia Pty Ltd v Lenny [2005] WAIRC 02081; (2005) 85 WAIG 2981

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1997) 180 CLR 266

Brackenridge v Toyota Motor Corporation Australia Ltd (1996) 142 ALR 99

Brackenridge v Toyota Motor Corporation Australia Ltd (1996) 67 IR 162

Brennan v Kangaroo Island Council [2013] SASCFC 151; (2013) 120 SASR 11; (2013) 239 IR 355

Brennan v Kangaroo Island Council [2014] HCASL 153

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

Capewell v Cadbury Schweppes Australia Ltd (1997) 78 WAIG 299

Commonwealth Bank of Australia v Barker [2014] HCA 32; (2014) 253 CLR 169

Elliott v Kodak Australasia Pty Ltd [2001] FCA 1804; (2001) 129 IR 251

Elliott v Kodak Australasia Pty Ltd [2001] FCA 807; (2001) 108 IR 23

Fire and All Risks Insurance Co Ltd v Rousianos (1989) 19 NSWLR 57

Fowler v Anthony & Sons Pty Ltd [2004] WAIRC 13416; (2004) 84 WAIG 3855

Golding v P.I.H.A. Pty Ltd [2004] WAIRC 12971; (2004) 84 WAIG 3639

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

Grout v Gunnedah Shire Council (No 2) (1995) 58 IR 67

Gunnedah Shire Council v Grout (1995) 62 IR 150

Guthrie v News Ltd [2010] VSC 196; (2010) 27 VR 196

Holt v Musketts Timber Sales Pty Ltd (1994) 54 IR 323

House v The King [1936] HCA 40; (1936) 55 CLR 499

Hutt v The Cascade Brewery Co Ltd A99/1991

Industrial Inspector of the Office of Industrial Relations v Holliday (1986) 66 WAIG 477

Johnson v Millswan Holdings Pty Ltd [2003] WAIRC 07592; (2003) 83 WAIG 348

Kartinyeri v Commonwealth [1998] HCA 22; (1998) 195 CLR 337

Kuczmarski v Ascot Administration Pty Ltd [2016] SADC 65

Logan v Otis Elevator Co Pty Ltd [1999] IRCA 4; (1999) 94 IR 218

Lynam v Lataga Pty Ltd (2001) 81 WAIG 986

Margio v Fremantle Arts Centre Press (1990) 70 WAIG 2559

McGowan v Direct Mail and Marketing Pty Ltd [2016] FCCA 2227

Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 [2006] HCA 53; (2006) 231 CLR 1

Minister of State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273

Neville Jeffress Advertising Pty Ltd v Barlow (No 2) A81/1993

Polites v Commonwealth [1945] HCA 3; (1945) 70 CLR 60

Ramsay Bogunovich v Bayside Western Australia Pty Ltd (1998) 79 WAIG 8

Rankin v Marine Power International Pty Ltd [2001] VSC 150; (2001) 107 IR 117

Richardson v Koefod [1969] 3 All ER 1264

Rogan-Gardiner v Woolworths Ltd [2012] WASCA 31

Scicluna v William Paul Brookes t/as Bayview Motel Esperance WA [2016] WAIRC 00862

SGS Australia Pty Ltd v Trevor Taylor (1993) 73 WAIG 1760

Society of Lloyd's v Clementson [1995] CLC 117

Thorpe v South Australian National Football League (1974) 10 SASR 17

University of Western Australia v Gray [2009] FCAFC 116; (2009) 179 FCR 346

Vermeesch v Harvey World Travel Franchises Pty Ltd (1997) 74 IR 364

Westen v Union des Assurances de Paris (No 2) (1996) 88 IR 268

Westpac Banking Corporation v Wittenberg [2016] FCAFC 33; (2016) 330 ALR 476; (2016) 256 IR 181

Windross v Transact Communications Pty Ltd [2002] FMCA 145

Reasons for Decision

SMITH AP:

The appeals and the orders appealed against

1 These appeals are instituted under s 49(2) of the *Industrial Relations Act 1979* (WA) (the IR Act) against decisions made by the Commission in U 188 of 2015 delivered on 27 April 2016 and B 188 of 2015 delivered on 21 April 2016.

2 Application U 188 of 2015 was an industrial matter referred to the Commission by Mark Darren Richards under s 29(1)(b)(i) of the IR Act. Mr Richards claimed that he had been harshly, oppressively or unfairly dismissed by GB & G Nicoletti (the respondents) on 23 October 2015. In U 188 of 2015 a declaration was made that the summary dismissal of Mr Richards on 23 October 2015 was harsh and unfair and an order was made requiring that the respondents forthwith pay Mr Richards the sum of $3,991.72 gross being compensation for the loss and injury caused by his summary dismissal ([2016] WAIRC 00248; (2016) 96 WAIG 504). This amount was calculated as compensation:

(a) for two weeks' pay for a period of time Mr Nicoletti should have implemented as a fair procedure to give Mr Richards a period of time to improve his performance;

(b) one week's pay in lieu of notice which is an amount that should have been paid to Mr Richards pursuant to cl 5(b) of the *Farm Employees' Award 1985* (WA) (the Award); and

(c) $1,000 for injury to Mr Richards caused by the dismissal.

3 Chief Commissioner Beech made an order to dismiss Mr Richards' claim for contractual benefits in B 188 of 2015 ([2016] WAIRC 00240; (2016) 96 WAIG 504). In this application, Mr Richards sought damages for breach of an implied term of reasonable notice or payment in lieu of notice of termination of employment (amended statement of claim dated 23 February 2016 (AB 42)). Chief Commissioner Beech dismissed this claim on grounds that there was no need to imply a term of reasonable notice in the contract of employment as cl 5(b) of the Award applied to Mr Richards' employment which entitled the respondents to terminate Mr Richards' employment by one week's notice or by payment of one week's pay.

Grounds of appeal

(a) FBA 3 of 2016

4 In FBA 3 of 2016, Mr Richards seeks only to challenge the award of compensation of $1,000 for injury made in U 188 of 2015. The amended ground of appeal in FBA 3 of 2016 is that Beech CC was wrong in law in assessing damages for the injury occasioned by the unfair dismissal by comparing Mr Richards' treatment by the respondents with that of the dismissed employee in ***Golding v P.I.H.A. Pty Ltd*** [2004] WAIRC 12971; (2004) 84 WAIG 3639. The particulars of the ground state that Beech CC failed to take into proper account, as required by s 23(7)(c) of the IR Act, the very material consideration that Mr Richards and his partner were subjected to threats and physical intimidation by the respondents during the termination of Mr Richards' employment.

(b) FBA 4 of 2016

5 The amended ground of appeal in FBA 4 of 2016 is that Beech CC erred in law in holding:

(a) that the Award notice provisions applied to Mr Richards' employment; and

(b) that there was no scope for the implication of reasonable notice to terminate Mr Richards' employment.

6 The particulars to this ground state that the notice provisions in the Award did not apply to Mr Richards by reason of the operation of div 3 of ch 6, pt 6-3 and s 762 of the *Fair Work Act 2009* (Cth) and the notice provisions in both the Award and s 117 of the *Fair Work Act* do not operate to exclude the implication of a term requiring reasonable notice to terminate the contract of employment.

The relevant facts and findings found at first instance

7 Mr Richards was employed as a stockman by the respondents for approximately three weeks. He commenced employment on 5 October 2015 and was dismissed without notice on 23 October 2015 for alleged incompetence.

8 The evidence of Mr Richards and Mr Nicoletti was different in respect of most material matters. After considering all of the evidence given by the parties, including each of the witnesses who gave evidence in support of each party's case, Beech CC substantially accepted the version of events given by Mr Richards and made a number of findings of fact which are relevant to the disposition of these appeals.

9 Before determining the facts, Beech CC observed that the reasoning in ***Industrial Inspector of the Office of Industrial Relations v Holliday*** (1986) 66 WAIG 477; ***Margio v Fremantle Arts Centre Press*** (1990) 70 WAIG 2559 and ***Johnson v Millswan Holdings Pty Ltd*** [2003] WAIRC 07592; (2003) 83 WAIG 348 established that incompetence may be sufficient justification for the exercise of the right of summary dismissal:

(a) where there has been an express or implied representation by the employee that he or she was competent to fulfil the job;

(b) the employee has been shown to be incompetent; and

(c) the employee has been warned that his or her employment has been unsatisfactory before terminating his or her employment.

(a) Mr Richards' previous farming experience

10 Mr Richards was born on a wheat and sheep farm near Dumbleyung in Western Australia and he spent all his childhood working on that farm and his grandfather's farm at Needilup. He worked at all aspects of farming - tractor driving, harvester driving, fencing, sheep work, shearing, crutching, dipping and anything to do with the day-to-day workings of a normal farm until the age of 17. At the time of giving evidence, Mr Richards was 51. After the age of 17 he served in the armed services for 15 years and then worked offshore on oil rigs on a fly-in/fly-out basis. Whilst working on oil rigs, on some of his 28 days off he returned to the family farm for a couple of his days to help out at shearing time, seeding time, harvest time and assist in fencing or general work.

(b) Mr Richards' employment interview

11 Mr Richards came to be interviewed by Mr Nicoletti after he responded to a job advertisement for a full-time stockman position located in the Central Wheatbelt. The advertisement was for an 'experienced hardworking stockman' to join a large farming operation. Mr Richards telephoned the number in the advertisement and spoke to Mr Nicoletti. Mr Richards told Mr Nicoletti that he was a shearer and had been brought up on the farm and had worked with sheep most of his life. They arranged for a time to meet in Welshpool.

12 Mr Richards and his partner, Ms Anna Marie Evans, met Mr Nicoletti in Welshpool. At that meeting, Mr Richards made Mr Nicoletti aware of his past employment.

13 Mr Nicoletti was impressed by Mr Richards having started shearing at the age of 10 because, in his view, 'anyone who starts shearing at 10 years of age must be ok'. He was aware that Mr Richards had left the farm at a very young age.

14 Mr Richards suggested he move up for a couple of months as a trial period 'to see what it was like and how everything went', but Mr Nicoletti replied that he had already had a couple of applicants like that and he wanted a family to move up there and stay together, and therefore they should come up as a family and he should commence work. Mr Nicoletti did not ask for a period of probation, which he might have been expected to in the circumstances. In fact, it was Mr Richards' evidence that he offered to come up for a period (as a single man) to 'see how it goes', but Mr Nicoletti had not wanted this.

15 Mr Nicoletti discussed with Mr Richards the salary, that it would involve working seven days a week and the accommodation. Mr Richards asked whether Mr Nicoletti would have a job somewhere for his son. His response was that if Mr Richards came up to look at the houses for the accommodation, the son should be brought along and Mr Nicoletti would speak to him.

16 Mr Richards did not make a misrepresentation to Mr Nicoletti that he had current farming experience. Mr Nicoletti did not ask for references. Mr Nicoletti knowingly agreed to employ in the position a person he knew had not been farming for some time and who had not been employed full-time on a farm for at least 15 or 20 years.

(c) The three weeks' employment

17 Mr Richards and his partner, Ms Evans, moved to the farm on 30 September 2015. They moved into a house supplied by the respondents, and spent some money making it 'liveable'. Mr Nicoletti arranged for paint and some electrical work to be done to the house.

18 On the day Mr Richards commenced employment he signed an employment agreement (AB 46).

(d) The dismissal

(i) Dismissal on grounds of incompetence - harsh and unfair

19 Mr Richards was dismissed because in the view of the respondents, Mr Richards took on a job that required previous experience, yet he did not have that experience, would talk over them and would not listen.

20 Mr Nicoletti decided very shortly after Mr Richards commenced work that the working relationship was not going to work.

21 Mr Richards' summary dismissal on grounds of incompetence was both harsh and unfair.

22 Chief Commissioner Beech found that Mr Nicoletti dismissed Mr Richards in part because Mr Nicoletti considered Mr Richards was not a team player, and in part because he formed the view that he and Mr Richards could not work together. Chief Commissioner Beech found these are not grounds justifying summary dismissal for incompetence. Not being a team player, or even being quite confronting, is not incompetence.

23 Mr Nicoletti has been farming in his own right since 1979. He has 26 people employed in his farming operations and 120 employees in other businesses. The very first day that he and Mr Richards drafted some rams, when Mr Richards was telling him to stand out of the way, Mr Nicoletti's evidence was he thought to himself, 'It doesn't quite work like that.' Mr Nicoletti formed the view that Mr Richards' handling of the sheep and trying to get them into the shed was incompetent and Mr Nicoletti made the decision there and then he was 'never going to last with us'.

24 Chief Commissioner Beech observed, however, that employing someone without recent full-time farming experience implies a period of familiarisation, if not learning. Yet, Mr Richards was not warned that he was considered incompetent and that he would be dismissed if he did not improve.

25 On the Friday morning that Mr Richards was dismissed, a co-worker had asked him to set up the yards and shut the gates so when the sheep came in they would go straight into the yards. This Mr Richards proceeded to do. He was shutting the last gate when Mr Nicoletti arrived, leant out of the window of his vehicle and asked what the hell he was doing. Mr Richards told Mr Nicoletti he was setting up the gates for when the sheep came and Mr Nicoletti replied, 'That's not how we do it here. You both go and get the sheep in.' Mr Richards told Mr Nicoletti he was doing what his co-worker had asked him to do. Mr Nicoletti started raising his voice, yelling at him and abusing him. Mr Richards asked Mr Nicoletti to please explain to him what it was he was doing wrong so that he could fix it. Mr Nicoletti kept yelling and abusing Mr Richards saying he was useless, not doing the right thing. Mr Nicoletti got out of the ute and continued to yell and scream at Mr Richards.

Mr Richards was bent back over the ute and Mr Nicoletti was a couple of inches from Mr Richards' face. Mr Richards put his hands between himself and Mr Nicoletti and pushed Mr Nicoletti away. Mr Nicoletti then told him to leave.

(ii) Immediate loss of accommodation - harsh

26 Chief Commissioner Beech found that Mr Richards' summary dismissal was also harsh because it had the effect that he would immediately lose the accommodation provided for him and his partner when Mr Nicoletti had preferred them to come up as a family and Mr Richards had only recently incurred the costs of moving himself and Ms Evans to the house and making some alterations. Dismissing Mr Richards summarily had an immediate and dramatic effect upon not only Mr Richards but his family. Summary dismissal immediately cut off Mr Richards' source of income and his entitlement to accommodation.

(e) Compensation - loss caused by the dismissal

27 Chief Commissioner Beech then went on to find that one measure of the loss caused by the dismissal was to consider how long Mr Richards would have continued in employment had the dismissal on 23 October 2015 not occurred. He found that when Mr Nicoletti realised it was not going to work out, a fair procedure should have followed. Further, Beech CC found that Mr Nicoletti should have arranged to meet Mr Richards and tell him he needed to improve his standard of work or his interaction with other employees and himself, to warn him that his job was in jeopardy if he did not do so, and give him a further period of time to improve.

28 Chief Commissioner Beech finally found that:

(a) taking into account that Mr Richards had not recently been employed full-time on a farm, and that he had been working there for only three weeks, that he had come to the position as a family, that he is 51 years of age and his dismissal meant that he would immediately lose the entitlement to accommodation for him and his partner, a fair further period of time would have been two weeks to implement this procedure;

(b) however, the evidence does not suggest that it is likely that Mr Richards and Mr Nicoletti would have established a better working relationship during that timeframe; and

(c) the evidence of how Mr Richards views his own skills, and how he and Mr Nicoletti reacted to each other, leads to a conclusion that it is more likely than not that Mr Richards would have been dismissed at the conclusion of that further two-week period. Mr Nicoletti would then have been required to give Mr Richards one week's notice of termination or payment in lieu of notice as the notice period and provision for pay in lieu of notice is prescribed by the Award in cl 5(b).

29 Thus, Beech CC concluded that the loss caused by the dismissal was the wages Mr Richards would have earned for two weeks plus one week's pay in lieu of notice which was calculated as $52,000 ÷ 52.144 = $997.24 per week x 3 = $2,991.72.

(f) Events subsequent to the dismissal

30 Chief Commissioner Beech then went on to consider the conduct of the respondents and their employees that occurred subsequent to the dismissal. The events he found were as follows:

(a) Mr Richards went home on the Friday he was dismissed and did not hear anything further until the following Monday morning when a ute pulled up with two employees. One of the employees told Mr Richards that Mr Nicoletti had asked them to retrieve Mr Richards' ute and everything else that had been given to him to use.

(b) On the Monday or the next day, Mr Richards drove to Albany to speak to his family. He returned to the farm on the Friday and on the following Monday he received a phone call from Mrs Nicoletti asking when he was going to vacate the house, at which time he informed her that he did not have the money to vacate the house. Mrs Nicoletti yelled and screamed at him whilst on the phone which he then handed to his partner. Mr Richards' evidence was that they both felt threatened by this conduct.

(c) On the Wednesday night Mr Richards heard Mr Nicoletti's ute driving by. The following night at about 8.30pm he heard the engine of Mr Nicoletti's ute again and saw the ute taking off very fast. Five or ten seconds later he heard a crash and saw the lights of the ute going all over the place. He then saw the lights coming straight towards him and Ms Evans. Mr Nicoletti stopped the ute and threatened him, telling him to get off his land or he had ways to get him off or get out of the house and that they had ways to get him out. Mr Richards told Mr Nicoletti he did not have the money but would leave when he could and went to walk around the side of the ute. Mr Nicoletti then took off in the ute, did a circle, came back aimed his ute straight at Mr Richards and stopped at the last minute, four or five inches short of him. Mr Nicoletti was yelling and screaming, 'Get off my land, get out, this is your last warning. Get out'. Mr Richards rang the police. They turned up about 50 minutes to an hour later. Mr Richards made a statement to the police and later sought and obtained a restraining order against Mr Nicoletti.

31 Mr Richards subsequently borrowed $7,500 from his mother so he and Ms Evans could move back to Perth.

(g) Injury caused by the dismissal

32 After having regard to the observations about the concept of 'injury' in s 23A(6) of the IR Act considered by the Full Bench in ***Capewell v Cadbury Schweppes Australia Ltd*** (1997) 78 WAIG 299, 303 and ***AWI Administration Services Pty Ltd v Birnie*** [2001] WAIRC 04015; (2001) 81 WAIG 2849, 2862, Beech CC found Mr Richards suffered an injury caused by the dismissal. In making this finding, he found:

(a) Mr Richards did not give direct evidence of how the dismissal itself affected him. His diary evidence was that his head was 'just whirling with what had happened' did not show that the manner of dismissal caused him injury beyond what he might be expected to have experienced.

(b) The later conduct of Mr Nicoletti where Mr Richards says he was threatened occurred on the Tuesday or Wednesday night of the following week. This conduct was in relation to the need to vacate the accommodation as a direct result of the dismissal and is part of the dismissal.

(c) Mr Richards' evidence is that both he and Ms Evans were stressed, not very well, not sleeping and not coping. The diary entry for 11 November 2015 shows Mr Richards needed to take Ms Evans to the doctor and there is a later reference to strong medication to help her sleep. He was fearful for their safety.

(d) The evidence shows Mr Richards suffered stress not just about himself, but also about Ms Evans, as an indirect consequence of the dismissal which had occurred, that is, the effect upon him and his family at having to vacate the accommodation provided but having lost the income to enable them to afford to do so.

33 Chief Commissioner Beech then had regard to the well-established principle that the assessment of compensation for injury is not capable of precise calculation but is a matter for individual assessment and found there is no case where compensation has been ordered for injury caused by a dismissal in similar circumstances. He then, however, noted an award had been made by Harrison C in ***Golding*** (3643) of $500 for injury in circumstances where the employer's handling of the dismissal caused the employee shock and humiliation when she was terminated in circumstances where the termination was summary and unexpected and she was supervised when she was required to pack up and leave the employer's premises straight after her termination. In light of this decision, Beech CC concluded when the stress suffered by Mr Richards about himself and his partner from the later conduct (subsequent to the dismissal) is considered, an order should be made that $1,000 be paid for the injury caused by the dismissal.

(h) Claim for denied contractual benefit

34 Chief Commissioner Beech found the claim for payment in lieu of reasonable notice of termination could not succeed. He also found that once it is recognised that the Award applies to Mr Richards' employment, the Award provision that engagement in terms of weekly hiring may be terminated only by one week's notice or by payment or forfeiture of one week's pay, means that the provision of notice, or for payment in lieu of notice, applies by virtue of the Award.

35 Chief Commissioner Beech then found that the existence of the Award provision makes the conditions of employment effective without any need to imply an obligation to give reasonable notice: ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410. For that reason, he found that there is no scope for the implication of a term of reasonable notice into Mr Richards' contract of employment.

Consideration - injury - FBA 3 of 2016

36 Pursuant to s 23A(6) of the IR Act, the Commission is conferred with a discretion to make an award of compensation to an employee who has been harshly, oppressively or unfairly dismissed for loss or injury caused by the dismissal.

37 The leading statement of principles to be applied by the Commission when considering whether to make an award of compensation for injury is set out in the following passage of the joint judgment of Coleman CC and Smith C in ***Birnie*** wherein it was said [200]:

> It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299). The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.
>
> 1 The circumstances in which the dismissal from employment has been effected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury (*Lynham v Lataga Pty Ltd* (2001) 81 WAIG 986).
>
> 2 However, the Commission is not able to adjust the measure of compensation according to the opinion of the employer or employee or of the conduct of the respective parties (*Capewell v Cadbury Schweppes Australia Limited* (op cit)).

38 From these principles emerges a requirement to assess the gravity or scale of the injury. In particular, when considering whether to make an award of compensation for injury, the following matters should be considered:

(a) Whether the behaviour by or on behalf of an employer by the termination of employment has caused injury to the employee.

(b) If the behaviour in question has caused an injury, the gravity of the behaviour of the employer.

(c) The level of effect or impact of the behaviour on the employee and whether the effect or impact goes beyond a level of distress that is caused by almost all employer initiated terminations of employment.

39 This approach was implicitly approved of by the Full Bench in ***Anthony & Sons Pty Ltd v Fowler*** [2005] WAIRC 01744; (2005) 85 WAIG 1899. In ***Fowler v Anthony & Sons Pty Ltd*** [2004] WAIRC 13416; (2004) 84 WAIG 3855, at first instance, Mr Fowler was awarded $3,000 as compensation for injury caused by his dismissal. He had been employed as a skipper of Swan River cruise boats and had ascertained his employment had been terminated by his employer when he was told his name was removed from the roster. He later received a letter informing him that there was no requirement for his services as there had been a downturn in trade. Mr Fowler was horrified, mortified and depressed which caused him to visit a doctor. The manner of the termination by the employer was found to be callous, caused Mr Fowler injury and he had suffered feelings of shock within the legal meaning of that word [40].

40 On appeal the award was reduced to $2,000. President Sharkey, with whom Mayman C agreed, assessed the nature of the injury to Mr Fowler to be towards the lower end of the scale [68]. His Honour then observed [69] - [70]:

> Speaking for myself, I would add this. There is something to be said for an opinion that awards in this Commission of compensation for injury are too low, and particularly in cases where there is medical and legal evidence of injury, but not solely. It might be said that Full Benches of this Commission should consider, if the parties submit it, whether the awards should be increased. However, that is a matter which it is not necessary to consider on this occasion and can await any submissions which are made another day before there is any consideration of it.
>
> This award was not sufficiently judged as being at the lower end of the scale, which the injury was. I would reduce it therefore by one-third to reflect that it was at the lower end of the scale and award $2,000.00 not $3,000.00. The discretion, for those reasons, and in that respect alone, I am satisfied, is established to have been miscarried within the grounds laid down in *House v The King* [1936] 55 CLR 499 because the amount is manifestly outside what a fair exercise of discretion would be. The Full Bench is therefore entitled to substitute its decision for that of the Commissioner at first instance, on that point.

41 Commissioner Kenner also agreed the award of compensation to Mr Fowler should be reduced to $2,000 on grounds that the effect of the dismissal was at the lower end of the scale. At [80] Kenner C found:

> In this case, the evidence as to the effect on the respondent of the dismissal was brief. However, simply because the evidence was brief, does not mean that it may not support a finding of injury for the purposes of s 23A(6) of the Act. Where there is an allegation or claim of injury, then some caution should be exercised. Whilst not always necessary, it will be of assistance in assessing any such claim if there is independent oral or documentary evidence of the effect of a dismissal on an employee, by way of medical or other evidence to that effect. On the evidence at first instance, the injury found by the learned Commissioner was certainly at the lower end of the spectrum and would warrant a limited award of compensation. I agree that to this extent, the discretion of the Commission at first instance miscarried and it would be appropriate to reduce the award by 30% in this case, given the evidence and the findings made.

42 The approach of the Full Bench in ***Anthony & Sons Pty Ltd v Fowler*** was applied by the Full Bench in ***Bone Densitometry Australia Pty Ltd v Lenny*** [2005] WAIRC 02081; (2005) 85 WAIG 2981. In that matter, Sharkey P, with whom Scott and Mayman CC agreed, after applying the principles approved of in ***Birnie***, said [124] - [126]:

> 'Injury', as the Commissioner found, embraces the actual harm done to an employee by an unfair dismissal and 'comprehends all manner of wrongs' including being treated with callousness. The Commissioner correctly observed, too, that whilst injury may be manifested by the detrimental impact on the physical or emotional wellbeing (or, for that matter, the reputation) of an employee unfairly dismissed, dismissals will affect individuals to varying degrees and, I might add, not at all.
>
> The Commissioner observed, too, that, while the need for professional care may be evidence of this impact, this will not always be necessary to establish the causal link between the termination of employment and the injury. Not every claim for injury, as the Commissioner correctly observed, necessarily involves or should involve expert evidence of emotional trauma. (The Commissioner referred, too, to *Timms v Phillips Engineering Pty Ltd* (1998) 78 WAIG 4460 and *Burazin v Blacktown City Guardian Pty Ltd* (FC) (op cit).)
>
> The Commissioner went on to observe, too, and correctly, that the circumstances in which the dismissal from employment had been effected may be sufficient to cause the injury experienced. Examples were given of locking an employee out of the workplace or escorting an employee from premises in full view of staff, particularly, I might add, if this were unjustifiably done by a police officer or uniformed security officer (see the discussion of these matters in *Lynham v Lataga Pty Ltd* (FB) (op cit).)

43 His Honour in ***Bone Densitometry Australia Pty Ltd*** also applied the principle that an employer is bound to take an employee's reaction to a dismissal as it found him or her. He said [133]:

> Ms Lenny clearly did not suffer shock and humiliation because of her personality. She, first of all, suffered it as a result of, and caused by, the unfair dismissal and the surrounding treatment of her, effected by Professor Will. That was entirely clear. That she might have suffered greater injury than someone else would, or any injury, was not established at all. Even if it were, it is trite to observe that BDA, as the respondent, was bound to take Ms Lenny as it found her. There was also unshaken evidence and uncontradicted evidence of her being bullied and exploited by Professor Will in the past, which might reasonably be found, if it were necessary, which it was not, to have caused a greater susceptibility to hurt and humiliation when the dismissal did come.

44 Finally, his Honour found [136]:

> In this case, and the authorities which I have cited above are clear, one must look at the nature of the unfair dismissal and other evidence to determine whether the unfair dismissal caused any injury alleged to have been caused by it. One has to look at the alleged injurious act and assess the conduct in that light when it has been alleged to be injurious.

45 In this matter, Beech CC did not make any assessment of the gravity of the behaviour of the respondents in effecting the dismissal which in this matter Beech CC found to include the vacating of the accommodation and the level and effect of the conduct that formed part of the dismissal on Mr Richards. In particular, Beech CC made no assessment of the relevant circumstances that are raised on the facts found by him. Whilst Beech CC correctly found that an assessment for injury is not capable of precise calculation but is a matter for individual assessment, he erred in having regard to the circumstances raised in and the award made in ***Golding***.

46 In my respectful opinion, such an assessment by regard to and the award made in ***Golding*** was in error for two reasons.

47 Firstly, the factual circumstances of ***Golding*** were entirely different. Ms Golding was a sales consultant who was made redundant. Although after being employed for less than a year, she was paid on termination four weeks' pay in lieu of notice and four weeks' pay as a redundancy entitlement. Prior to the termination of her employment she had some time off work for medical appointments for a hand injury. On the day her employment was terminated Ms Golding was asked to attend a meeting at which she was advised that her job had been made redundant as her sales had not been progressing due to the time she had off with the hand injury. Ms Golding was shocked, upset and angry as excessive time off had not previously been raised with her. She was required to immediately pack up her personal effects and was watched whilst doing so.

48 Secondly, an assessment of an award of compensation for injury should only be made by regard to the matters raised in s 26(1)(a), s 26(1)(c) and, if relevant, s 26(1)(d) and, in particular, the relevant facts and circumstances pursuant to s 23A(7)(c) of the IR Act and any matters raised in s 23A(7)(b) of the IR Act.

49 By acting upon a wrong principle, Beech CC erred in the exercise of the discretion conferred by s 23A of the IR Act to make an award of compensation. In these circumstances, it is open to the Full Bench to exercise its own discretion in substitution of the discretion at first instance by applying the findings of fact and considering the circumstances found by Beech CC.

50 In this matter:

(a) Mr Richards had to incur considerable expense to move his family from the farm and whilst Beech CC found these expenses were not losses caused by the dismissal, the loss of accommodation and the fact that the respondents engaged in threatening, abusive and harassing behaviour on more than one occasion in an attempt to get Mr Richards and his family to leave the farm when Mr Richards had lost the income to enable them to afford to do so are relevant circumstances.

(b) The threatening and abusive behaviour of Mr Nicoletti towards Mr Richards at the time of the dismissal on Friday, 23 October 2015 is also a relevant circumstance.

(c) The effect of the behaviour of the respondents on Mr Richards was that Mr Richards was fearful of his safety and suffered stress about himself and also about his partner.

51 The gravity of the behaviour of the respondents towards Mr Richards was, in my opinion, very serious and could be characterised at a very high end of the scale of callous and abusive behaviour of an employer. The behaviour was not only threatening and callous but was sustained for more than one week. The level of the effect and impact of this behaviour on Mr Richards was to cause fear and stress which must on the facts have continued during at least the period of behaviour. In the absence of medical evidence of the effect of the stress on Mr Richards or whether such effect was long lasting post dismissal, it could not be said that the effect of the behaviour on Mr Richards is at the very highest end of the scale, but can be assessed at the very least to be serious.

52 For these reasons, I am of the opinion that the ground of appeal in FBA 3 of 2016 is made out. In particular, I am satisfied that Beech CC did not give proper regard to the gravity of the threats made to Mr Richards and his partner and the stress caused by this behaviour. I am satisfied that an award of $1,000 for injury is in these circumstances unjust. When such a failure to properly exercise a discretion is made out, it is open for an appellate body to substitute its own discretion: ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499; ***Gronow v Gronow*** [1979] HCA 63; (1979) 144 CLR 513, 534 - 535 (Aicken J). When all of the circumstances are considered, I am of the opinion that the injury to Mr Richards caused by behaviour, which was found by Beech CC to form part of the dismissal, should be assessed towards the higher end of the scale (but not at the highest) and that a sum of $6,000 as compensation for injury should be awarded to Mr Richards.

FBA 4 of 2016 - does s 117 of the *Fair Work Act* operate to exclude the implication of a term requiring reasonable notice to terminate the contract of employment?

53 Section 117 of the *Fair Work Act* provides:

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

(a) delivering it personally; or

(b) leaving it at the employee's last known address; or

(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period

	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

54 The operation of s 117 of the *Fair Work Act* is extended to employees of non-national system employers by operation of s 758, s 759, s 760, s 761 and s 762 of the *Fair Work Act*. Section 758 provides:

The object of this Division is to give effect, or further effect, to:

(a) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and

(b) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website (www.ilo.org).

55 Section 759 provides:

Extension of Subdivision A of Division 11 of Part 2-2 and related provisions

(1) The provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2), apply in relation to a non-national system employee as if:

(a) any reference in the provisions to a national system employee also included a reference to a non-national system employee; and

(b) any reference in the provisions to a national system employer also included a reference to a non-national system employer.

Note 1: Subdivision A of Division 11 of Part 2-2 provides for notice of termination or payment in lieu of notice.

Note 2: This subsection applies to express references to national system employees and national system employers, and to references that are to national system employees and national system employers because of section 60 or another similar section.

(2) The related provisions are the following, so far as they apply in relation to Subdivision A of Division 11 of Part 2-2 as it applies because of subsection (1):

(a) the provisions of Division 2, Subdivision C of Division 11, and Division 13, of Part 2-2;

(b) any other provisions of this Act prescribed by the regulations;

(c) any provisions of this Act that define expressions that are used (directly or indirectly) in provisions of Subdivision A of Division 11 of Part 2-2, or in provisions referred to in paragraph (a) or (b) of this subsection.

Modifications are set out in Subdivision B

(3) The extended notice of termination provisions have effect subject to the modifications provided for in Subdivision B. The ***extended notice of termination provisions*** are the provisions of Subdivision A of Division 11 of Part 2-2, and the related provisions identified in subsection (2) of this section, as they apply because of this section.

Regulations made for the purpose of provisions

(4) Subsection (1) also applies to any regulations made for the purpose of a provision to which that subsection applies, other than a provision that is modified by Subdivision B.

56 Section 760 provides:

A non-national system employer must not contravene the extended notice of termination provisions.

Note: This section is a civil remedy provision (see Part 4-1).

57 Section 761 provides:

A reference in this Act, or another law of the Commonwealth, to the National Employment Standards includes a reference to the extended notice of termination provisions.

58 Section 762 provides:

This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements relating to notice of termination of employment (or payment in lieu of notice), to the extent that those laws:

(a) apply to non-national system employees; and

(b) provide entitlements for those employees that are more beneficial than the entitlements under the extended notice of termination provisions.

(a) The parties' submissions

59 In B 188 of 2015, Mr Richards sought pay in lieu of an implied term in his contract of employment that he would be given reasonable notice of termination of employment.

60 Chief Commissioner Beech found that because the Award applied to Mr Richards' employment, the award for one week's notice or payment in lieu for weekly hire employees applied without any need to imply an obligation to give reasonable notice and there was no scope for the implication of a term for the giving of reasonable notice into the contract.

61 Mr Richards argues firstly the finding that the Award provision applied to his employment was in error because of the operation of s 109 of the *Australian Constitution* (the Constitution) and s 762 of the *Fair Work Act* rendered the Award provision inoperative. This is because the effect of s 762 is to provide that employee entitlements relating to notice of termination of employment or payment in lieu of notice apply to non-national system employees unless those entitlements for those employees are more beneficial than the entitlements under the extended notice of termination provisions in the *Fair Work Act*.

62 At the hearing of the appeals on 17 August 2016, it was disputed by Mr J Graham on behalf of the respondents that s 117 of the *Fair Work Act* applied to the employment of Mr Richards. At the conclusion of the hearing on that day the Full Bench invited the respondents to file supplementary submissions which dealt with the effect of s 762 and s 117 of the *Fair Work Act* and whether those provisions operate pursuant to s 109 of the Constitution to override the provisions of the Award. It was contemplated that once those submissions were filed that Mr McCorry, who appeared on behalf of Mr Richards, would then draft and serve notices of a matter arising under the Constitution or involving its interpretation to the Attorneys-General of the Commonwealth and of the States pursuant to s 78B of the *Judiciary Act 1903* (Cth).

63 However, on 26 August 2016 submissions were filed on behalf of the respondents by their solicitors in which it was stated that the respondents concede that the effect of s 26, s 762 and s 117 of the *Fair Work Act* exclude the application of the notice provisions in the Award. In particular, it is conceded in the submissions that the Award provision is not more beneficial than the entitlements under s 117 of the *Fair Work Act*. The submissions also state in effect that it is accepted that the operation of s 762 and s 117 are intended to cover the field and to exclude any state based industrial laws, except to the extent that they are expressly preserved by s 762.

64 However, at the hearing of the appeals on 19 September 2016, Mr Sirett on behalf of the respondents, informed the Commission that the constitutional effect of the provisions of the *Fair Work Act* was not something that they could rightly concede as it was a matter going to the jurisdiction of the Commission. However, having said that, Mr Sirett put no submission to the Full Bench which departed from the matters set out in the submissions that had been filed on behalf of the respondents on 26 August 2016.

65 It is argued on behalf of Mr Richards that:

(a) neither s 117(2) of the *Fair Work Act*, nor the extended application provided for by s 759, or any other provision in the *Fair Work Act* has the effect of ousting an implied term requiring the giving of reasonable notice. Section 117(2) refers to the requirement to give 'at least' the prescribed notice periods therein, while s 762 expressly preserves any state law that provides for more beneficial periods of notice of termination. Section 117(2) and s 762 give effect to the *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* ([1994] ATS 4) (the Termination of Employment Convention), in particular Article 11 which requires reasonable notice to be given and s 117(2) of the *Fair Work Act* merely expresses minimum terms of notice;

(b) the Industrial Relations Court has said that such clauses in awards do not necessarily imply that the contractual right to reasonable notice is to be abolished or made inoperative: ***Westen v Union des Assurances de Paris (No 2)*** (1996) 88 IR 268, 279 - 280. In particular, Madgwick J made the point that the clause in the award providing for notice did not exclude the implied term of an employer's obligation to give reasonable notice as the award applied to all categories of employees from outside workers right up to administrative staff and that clause because it applied so widely to all levels of potential employment needed to be read consistent with the Termination of Employment Convention (279);

(c) where an award or a statute provides for a fixed period of notice in the sense of imposing a positive obligation for a minimum period of notice, the obligation is to give not less than that period of notice; it does not mean that you must give only that notice and no more. Section 758 of the *Fair Work Act* requires effect to be given to the Termination of Employment Convention;

(d) section 117(2) of the *Fair Work Act* does not preclude the implication of an implied term of reasonable notice because there is a 'gap' in the requirement to give reasonable notice as required by the Termination of Employment Convention that has not been filled comprehensively by the enactment of s 117 as s 117(2) only specifies minimum periods of notice;

(e) the contract of employment of Mr Richards provided for an annual salary and for annual leave to be taken annually (AB 46). That of itself indicates a lengthy period of employment was anticipated and the fact that the annual salary was payable fortnightly under the contract of employment does not imply reasonable notice of a fortnight. The test of what period, in all of the circumstances, would constitute reasonable notice is a period that would give both parties time to adjust to the new circumstances that occur when the contract ends and is to cushion the employee against the sudden loss of employment by providing an opportunity to obtain new employment of a similar nature: ***Rogan-Gardiner v Woolworths Ltd*** [2012] WASCA 31 [46] - [50]; ***Rankin v Marine Power International Pty Ltd*** [2001] VSC 150; (2001) 107 IR 117 [220]. Factors relevant in any particular case are accepted to depend upon the particular facts of a case: ***Rogan-Gardiner***;

(f) a period of time that would constitute reasonable notice for the termination of Mr Richards' employment would be a period of 60 days. The basis of this submission is that pursuant to the provisions of the *Residential Tenancies Act 1987* (WA) the notice that was given to Mr Richards by the respondents to quit the tenancy was a period required by that Act to be not less than 60 days;

(g) the relevant circumstances for determining the period of reasonable notice for Mr Richards are that he was employed as a farm hand, which by its nature is seasonal work, in a location and under financial constraints that prevented him from quickly moving to another place to seek alternative employment if it was available. Chief Commissioner Beech found that Mr Richards did seek alternative employment as both a farm hand and in his previous oilfield role but had been unsuccessful for a lengthy period (AB 26 - 27, [141]). It is also relevant to consider Mr Richards' evidence that there was only a prospect of farming work becoming available at the start of the next season, which was after the hearing at first instance was concluded;

(h) the cost of moving from the respondents' farm and Mr Richards' evidence of having to borrow $5,000 from his mother in order to do so and obtain alternative accommodation, while found by Beech CC to not be a loss for which compensation could be ordered, is also a material factor in determining a period that would cushion the employee against the sudden loss of employment; and

(i) the factors in (f) to (h) outweigh the fact that Mr Richards was only employed for a short period.

66 It is submitted on behalf of the respondents that:

(a) the fact that the state award is overridden by the provisions of the *Fair Work Act* does not mean a term of reasonable notice is to be implied in every employment contract;

(b) it is only proper to imply a term of reasonable notice in a particular case where it is both reasonable and necessary to give the employment contract efficacy. This proposition is supported by the decision in ***Byrne v Australian Airlines Ltd***;

(c) where the *Fair Work Act* provides for a statutory minimum notice period, there is no necessity to imply a term of reasonable notice to give the employment contract efficacy, as the employee will be entitled to a guaranteed period of notice;

(d) the weight of authority overwhelmingly supports the proposition that an effective award or statutory provision will, except in the most exceptional circumstances, preclude the implication of a term of reasonable notice. The reason for that is it is not necessary to imply a term of reasonable notice where a statutory provision or an award applies to an employment contract. Consequently, there is no gap to be filled; that is there is no need to imply a term of reasonable notice;

(e) inherent in the respondents' argument is that there is scope in some matters that come before the Commission to imply a term of reasonable notice and find the term is not excluded by s 117 of the *Fair Work Act*. There may be particular circumstances that surround the employment relationship which would give rise to the implication of a term of reasonable notice, but the starting point is whether there is necessity to do so. In this matter, there is no such necessity to imply a term of reasonable notice;

(f) in this matter, Mr Richards, pursuant to s 117 of the *Fair Work Act*, was entitled to a guaranteed period of notice. The existence of the Award and its application over a long period of time in this particular industry, coupled with the minimum provisions in s 117, support a finding that the farming industry practice is consistent with the statutory minimum and would be disturbed only where such a term was clearly incompatible with all the relevant surrounding circumstances;

(g) the particular circumstances of the employment relied upon by Mr Richards to support an implication of a reasonable term include significant subjective matters, for example, the borrowing of money from his mother to take up the employment. These circumstances, which are probably unknown to the respondents, do not assist in the implication of a term of reasonable notice. A unilateral and subjective intention is not the mutual intention of the contracting parties, nor one that an officious bystander would consider reasonable and necessary in the sense

of being required to make the contract effective (ie efficacious). (However, it is conceded by counsel that if a period of reasonable notice did apply then it would be relevant to take into account the fact that Mr Richards moved his entire family to the farm and was induced to do so by Mr Nicoletti); and

(h) in these circumstances, in the absence of an express agreement between the parties, the minimum term in s 117 of the *Fair Work Act* should apply and the period of notice would be one week. That was the outcome of the original hearing. Consequently, this appeal should be dismissed on grounds that it does not result in any different outcome.

(b) Consideration - FBA 4 of 2016 - does the notice provision in the Award provide entitlements that are more beneficial than the extended notice provision in s 117 of the *Fair Work Act*?

67 Clause 5 of the Award provides:

(a) An employer shall have the option of engaging an employee other than an apprentice either under terms of weekly hiring or as a casual employee. An employee not specifically engaged as a casual employee, shall be deemed to be employed on terms of weekly hiring. A casual employee shall mean an employee engaged and paid as such.

(b) If the engagement is on terms of weekly hiring, it shall be terminated only by a week's notice or by payment or forfeiture of one week's pay in lieu of notice by either side. Provided that this clause shall not affect the right of the employer to dismiss an employee without notice for incompetence or misconduct and in such cases wages shall be paid up to the time of dismissal.

68 As cl 5(b) prescribes a period of one week's notice to all employees whose employment is covered by the Award, irrespective of length of service (or whether an employee is over the age of 45 years where an employee has completed at least two years' of continuous service), cl 5 cannot be characterised as a more beneficial provision than the periods prescribed in s 117 of the *Fair Work Act*. Consequently, s 117 (when read with s 759, s 760, s 761 and s 762 of the *Fair Work Act*) applies to exclude the operation of cl 5(b) of the Award.

(c) The implied term of reasonable notice - principles to be applied

(i) A term implied in law

69 The common law will imply a term that a contract of employment may be terminated on reasonable notice into a contract with no provision for termination, except in circumstances justifying summary dismissal to overcome a presumption of yearly hiring: ***Byrne v Australian Airlines Ltd*** (429) (Brennan CJ, Dawson and Toohey JJ); ***Richardson v Koefod*** [1969] 3 All ER 1264; ***Thorpe v South Australian National Football League*** (1974) 10 SASR 17, 29; ***Westpac Banking Corporation v Wittenberg*** [2016] FCAFC 33; (2016) 256 IR 181 [219] - [222] (Buchanan J). In ***Rankin***, Gillard J explained [202] - [206]:

> The general rule is that such a contract is irrevocable, unless there is something in the contract from which it could be implied that it was not irrevocable and could be determined by either party giving notice: see *Llanelly Railway and Dock Co v London and North Western Railway Co* (1873) LR 8 Ch App 942 at 949-50 and (1875) LR 7 HL 550 at 567; *Crawford Fittings Co v Sydney Valve and Fittings Pty Ltd* (1988) 14 NSWLR 438.
>
> The law has developed exceptions to the general rule, and one of them is the contract of service. In the nineteenth century, the courts held that it was to be implied into a contract of service, in the absence of any evidence to the contrary, that either party could bring the contract of employment to an end by giving a reasonable period of notice to terminate.
>
> In *Creen v Wright* (1876) 1 CPD 591, Lord Coleridge CJ, delivering the judgment of the Court, said (at 594):
>
> > 'As to the notice, we think the sound construction of the contract before us is, that, except in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract.'
>
> See also *Payzu v Hannaford* (1918) 2 KB 348.
>
> The term is implied by law.

70 Employment contracts are generally subject to a number of terms implied by the law. All such terms are subject to the express provisions of the particular contracts and any applicable statutes which includes a term to give reasonable notice of the termination of the contract other than for breach: ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32; (2014) 253 CLR 169 [30] (French CJ, Bell and Keane JJ).

71 The criterion for implying a term in law is necessity. In ***Barker***, French CJ, Bell and Keane JJ observed [28] - [29]:

> An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams* ((1996) 186 CLR 71), some implications in law derive from the implication of terms in specific contracts of particular descriptions, which become 'so much a part of the common understanding as to be imported into all transactions of the particular description' ((1996) 186 CLR 71 at 103, quoting *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449 per McHugh and Gummow JJ). The two kinds of implied terms tend in practice to 'merge imperceptibly into each other' ((1996) 186 CLR 71 at 103, quoting Glanville Williams, 'Language and the Law – IV', *Law Quarterly Review*, vol 61 (1945) 384, at p 401). That connection suggests, as is the case, that the 'more general considerations' informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of 'necessity', which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means'.

> In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined' ((1995) 185 CLR 410 at 450) or the contract would be 'deprived of its substance, seriously undermined or drastically devalued' ((1995) 185 CLR 410 at 453. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78] per McHugh, Gummow and Hayne JJ). The criterion of 'necessity' in this context has been described as 'elusive' (*Crossley v Faithful and Gould Holdings Ltd* [2004] ICR 1615 at 1627 [36]) and the suggestion made that 'there is much to be said for abandoning' (Peel, *Treitel: The Law of Contract*, 13th ed (2011), p 231 [6-043]) the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary (*University of Western Australia v Gray* (2009) 179 FCR 346 at 376-377 [139]-[142]). The same constraints apply whether or not such implications are characterised as rules of construction.

72 Thus, necessity is judged by reference to contracts generally or to the class of contract to which the implied term is to apply. In this matter, the relevant class of contract is employment contracts.

73 The Full Court of the Federal Court in ***University of Western Australia v Gray*** [2009] FCAFC 116; (2009) 179 FCR 346 explained the general principles governing the implication of a term by law into a contract and, in particular, the implication of terms in employment contracts. At [135] the Full Court set out the following observations in ***Society of Lloyds v Clementson*** [1995] CLC 117, 131:

> Terms implied in fact are individualised gap fillers, depending on the terms and circumstances of a particular contract. Terms implied in law are in reality incidents attached to standardised contractual relationships, or perhaps more illuminatingly, such terms can in modern US terminology be described as standardised default rules.

74 After referring to this principle, the Full Court said in ***University of Western Australia v Gray*** that the test for implying a term in law is different to the criteria to be considered when determining whether a term should be implied in fact. Their Honours observed [136]:

> We begin with what is well accepted. (i) Terms implied in law are 'legal incidents of the particular class of contract' to which they respectively relate: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 345. They are to be found in many commonly occurring types of contract — sales, employment, landlord and tenant, doctor-patient, etc. (ii) They are not based upon the intention of the parties, actual or presumed, in a given instance, although the provenance of a particular term may well have been the commonplace use of such a term in earlier times in contracts of that type, so establishing what later would become the default rule: see *Byrne* 185 CLR at 449. (iii) Neither are they founded on the need to give efficacy to a contract: *Codelfa Construction* 149 CLR at 345; although, as has often been recognised, there can be a deal of overlap between terms implied in law and terms implied in fact in particular contractual settings: see eg *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 (*Hughes Aircraft Systems International*) at 193. While implication in law is also said to be based on 'necessity', that necessity, as will be seen, is informed by 'more general considerations than mere business efficacy': *Lister v Romford Ice and Cold Storage Company Pty Ltd* [1957] AC 555 (*Lister*) at 576. (iv) Implication of a term in law yields to the contrary intention of the parties as expressed in their contract or because of inconsistency with the terms that have been agreed: *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 (*Castlemaine Tooheys*) at 492B-C; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 (*Shell UK*) at 1196.

(ii) Section 117 of the *Fair Work Act*

75 It is well established that an implied term of reasonable notice in employment contracts may be excluded by an express term that evinces a clear intention to the contrary or by a statutory provision or an award provision that precludes the implication of a term requiring reasonable notice. In this appeal, the former is not raised as Mr Richards' contract of employment contained no agreed term that dealt with the termination or duration of the contract.

76 There is controversy about whether s 117(2) of the *Fair Work Act* operates to exclude an implied term of reasonable notice.

(iii) Legislative history of similar commonwealth termination of notice provisions and the beginning of divergent judicial opinions

77 A similar provision to s 117 was first enacted in commonwealth legislation in 1993 by the enactment of s 170DB of the *Industrial Relations Act 1988* by s 21 of the *Industrial Relations Reform Act 1993* (Cth). Section 170CA(1) provided that s 170DB was enacted to give effect, or further effect to the Termination of Employment Convention (which was set out in full in sch 10 of the *Industrial Relations Act 1988*). Section 170DB(1) specified that an employer must not terminate an employee's employment unless the employee has been given the period of notice required by s 170DB(2) or compensation in lieu of notice. The periods specified in s 170DB(2) were not, however, specified as minimum periods of notice.

78 An argument that the notice periods prescribed in s 170DB(2) of the *Industrial Relations Act 1988* could be treated as a period of reasonable notice, or be construed to operate to limit a period of reasonable notice a court could imply, was rejected by Moore J in ***Grout v Gunnedah Shire Council (No 2)*** (1995) 58 IR 67. At (80), his Honour found:

> The respondent then submitted that what might be treated as reasonable notice is the standard of notice found in s 170DB of the Act which would require the giving of five weeks notice. In this context, the respondent referred to the judgment of Northrop J in *Holt* v *Musketts Timber Sales Pty Ltd* (1994) 54 IR 323 in which his Honour concluded that a manager of a timber mill located in Tasmania was entitled to one week's notice only. It is clear that this conclusion depended upon the terms of s 47 of the *Industrial Relations Act* 1984 (Tas) which relevantly provided that the employment was 'terminable

> by either party by … a week's notice'. However, s 170DB is framed in terms materially different to s 47. Section 170DB is in Pt VIA of the Act which concerns the minimum entitlements of employees. Section 170DB is expressed to be a prohibition on termination unless the specified notice is given. Unlike s 47, it does not invest the employer with a statutory right to terminate irrespective of what are the common law contractual rights of the parties whether express or implied. It thus preserves the operation of those contractual rights as long as they do not fall short of the minimum set by s 170DB. In my opinion, if no notice is expressly agreed between an employer and an employee, s 170DB does not operate to limit the period of notice that a Court would imply as reasonable notice by reference to the criteria the common law has developed when determining damages for wrongful dismissal.

79 As Mr Grout held a senior position and other employment was difficult to find, Moore J found Mr Grout was entitled to nine months' notice (80). ***Grout v Gunnedah Shire Council (No 2)*** was overturned by the Full Court of the Industrial Relations Court of Australia on grounds that did not involve a consideration of the effect of the notice periods prescribed in s 170DB: ***Gunnedah Shire Council v Grout*** (1995) 62 IR 150.

80 The same argument that the notice periods prescribed in s 170DB(2) could be treated as a period of reasonable notice was also rejected by Wilcox J in ***Vermeesch v Harvey World Travel Franchises Pty Ltd*** (1997) 74 IR 364. At (365) his Honour found:

> I do not agree with the submission of Mr Gallagher that the five weeks provided by s 170DB of the *Industrial Relations Act* 1988 (Cth) as a statutory period of notice should be treated as reasonable notice in this case. The statutory formula takes no account of the circumstances of individual employees, other than the duration of the employment and that the employee is over the age of 45 years. It does not differentiate between a person working in a highly specialised and responsible position, to which that person may have moved at considerable expense and inconvenience to himself or herself and family members, and a person who is in a position where it is relatively easy to obtain alternative employment. One has to look at the circumstances of the case.

81 A similar issue was raised in ***Westen v Union des Assurances de Paris (No 2)***. In that matter the question was whether the implied term of reasonable notice could be implied, or was to be regarded as inoperative, if a relevant award makes provision for termination of employment upon a specified period of notice. At the time the matter in ***Westen v Union des Assurances de Paris (No 2)*** arose, s 170HA of the *Industrial Relations Act 1988* provided:

> On and after 26 February 1994, when the Termination of Employment Convention takes effect, any award or order of the Commission that is inconsistent with the requirements of that Convention does not have effect to the extent of the inconsistency.

82 After setting out s 170HA in his reasons for decision, Madgwick J had regard to Article 11 of the Termination of Employment Convention which expressly provides for an entitlement to employees on termination of their employment to be given reasonable notice or compensation in lieu thereof, unless guilty of serious misconduct and found that the award simply could not have the effect attributed to it by the employer (278). His Honour then found (279):

> So cl 19 applies to every employee from the junior messenger, through occupations such as keyboard operators, and on and up through assessors, underwriters and actuaries and so on to, finally, the general managers.
>
> Without the award provision, for many classes of employees, their implied right to reasonable notice would considerably exceed the minimal periods specified in the award. However, there would be some employees for whom reasonable notice would be less than four weeks and even less than two weeks. The language of the clause, except where an express obligation is cast upon employees to give at least two weeks' notice or to forfeit wages therefor, is that of limitations being placed upon respondent employers: the clause is not one which is aimed at adding, except, possibly, in the respects mentioned, to their rights. Nevertheless, the award establishes, overall, fairly low minima for periods of notice which must be given. The purpose, one deduces, of the award provisions is to relieve the less-skilled employees against a low common law measure of reasonable notice, to be judged simply against the market — often and increasingly a rather cold place for such people. In other words, the clause is mainly intended to augment the common law rights of the more needful employees; not to cut such rights away from the others.
>
> The clause does not say, nor does it necessarily imply, that the right of reasonable notice, for employees for whom such notice might be months longer than four weeks, is to be abolished or made inoperative. The award can have a sensible and reasonable operation if it is read as meaning that an employer's obligation to give reasonable notice is assumed and endures, but, reasonable or no, the employer must give the minimum periods of notice prescribed in the award.

83 His Honour also observed (280):

> I would add that s 170DB can hardly be said to take up where the award thus, as it were, left off. As I said in *Hawkins v Smorgon Meat Group* (unreported, Industrial Relations Court of Australia, Madgwick J, 31 July 1996), now approved in *Smorgon Meat Group v Hawkins* (unreported, Industrial Relations Court of Australia, Full Court, 6 December 1996) 'the section imposes minimal obligations upon employers; it does not give them rights'. When the object of the Termination of Employment Division of the Act is to give effect to the Convention (s 170CA(1)), and the Convention contains Art 11, how could it be otherwise?

84 In ***Brackenridge v Toyota Motor Corporation Australia Ltd*** (1996) 67 IR 162, Beazley J took a different view. Her Honour had before her a claim for payment for breach of an implied term to give reasonable notice of termination in the Court's associated jurisdiction conferred by the *Industrial Relations Act 1988*. The applicant's employment was found by her Honour to have been terminated on 2 February 1995 by a demotion. In ***Brackenridge***, the applicant's employment was governed by the *Toyota Australia Vehicle Industry Award 1988* which provided for the periods of notice which the employer was to give upon termination. Her Honour found there was no room for the implication of a term relating to the same subject matter as an award provision. In making this finding, her Honour relied upon observations made in ***Byrne v Australian Airlines Ltd***. At (189) she said:

As has already been observed, terms of an award are not implied into the contract of employment. However, the award still governs the employment to the extent that the express terms of the employment do not make some greater or more beneficial provision. As Brennan CJ, Dawson and Toohey JJ said in *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 800; 61 IR 32 at 35-36:

> 'The award regulates what would otherwise be governed by the contract. But [the award provision is] imported as a statutory right . . . The importation of the statutory right into the employment relationship does not change the character of the right. As Latham CJ points out in his judgment in *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 423, the legal relations between the parties are in that situation determined in part by the contract and in part by the award.
>
> . . .
>
> In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award (See *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284) and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations.'

Their Honours further stated (at 801; 37):

> '. . . a term of an award derives its force, not from agreement between the parties, but from statute. That being so, if a contract of employment is made in reliance upon a provision of an award, it is not a reliance which requires the provision to be made a term of the contract because it already has statutory force.'

It follows that where an Award governs a particular aspect of employment, there is no room for the implication of a term relating to precisely the same subject matter. Accordingly, I reject the submission that there was an implied term as alleged.

85 Her Honour, however, did not have regard to the decisions of Moore J in ***Grout v Gunnedah Shire Council (No 2)***, Wilcox J in ***Vermeesch*** or Madgwick J in ***Westen v Union des Assurances de Paris (No 2)***. Nor did she have regard to s 170HA of the *Industrial Relations Act 1988* which rendered an award provision inoperative if it was inconsistent with the requirements of the Termination of Employment Convention, in particular the requirement in Article 11 to give reasonable notice. Further, her observations were obiter as her Honour found Ms Brackenridge was guilty of wilful misconduct which justified termination of her contract without notice. On appeal, the court did not decide this point: ***Brackenridge v Toyota Motor Corporation Australia Ltd*** (1996) 142 ALR 99, 105 - 109.

86 Section 170HA was subsequently repealed by Item 10 of sch 6 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) which became operative on 31 December 1996.

87 Section 170DB was repealed and replaced by s 170CM of the *Workplace Relations Act 1996* (Cth). Section 170CM(1) also required the giving of a period of notice specified in s 170CM(2). The Termination of Employment Convention was retained in sch 10 of the *Workplace Relations Act 1996*. However, no equivalent of s 170CA(1) of the *Industrial Relations Act 1988* was re-enacted. Section 170CA(1) was, prior to its repeal, in substantially the same terms as s 758 of the *Fair Work Act*.

88 Section 170CM was later renumbered s 661 by sch 5 Item 1 of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

(iv) Legislative provision and award provisions that provide for specified notice - can a provision of this kind be distinguished from the operative effect of s 117 of the *Fair Work Act*?

89 Observations made by their Honours in ***Byrne v Australian Airlines Ltd*** about the implication of a term to be implied in fact were applied by the Full Court of the Supreme Court of Tasmania in ***Australian National Hotels Pty Ltd v Jager*** [2000] TASSC 43; (2000) 9 TASR 153. The issue raised in ***Jager*** was whether s 47(2) of the *Industrial Relations Act 1984* (TAS) precluded an implied term of reasonable notice in an employment contract. Section 46 and s 47(2) of the Tasmanian *Industrial Relations Act 1984* provided:

> 46 This Division applies to the employment of a person whose terms and conditions of employment are not –
>
> (a) prescribed by or under any Act or Act of the Commonwealth; or
>
> (b) regulated by an order, award, determination or agreement having effect under any Act or Act of the Commonwealth.
>
> **47** (2) Subject to subsection (3), a term or period of service of employment to which this Division applies that is of indefinite duration is terminable by either party by –
>
> (a) a week's notice, if the wages are payable weekly;
>
> (b) a fortnight's notice, if the wages are payable fortnightly; or
>
> (c) a month's notice in any other case.

90 In ***Jager***, Evans J, with whom Underwood and Crawford JJ agreed, found [26]:

> It follows from the approach taken by the members of the High Court in *Byrne v Australian Airlines Ltd* that as s47(2) applies to the parties' contract of employment with the effect that the contract is terminable on one month's notice by

> either party, there is no opening for the implication of a term as to the giving of reasonable notice of the termination of the respondent's employment into the contract, it not being necessary.

91 His Honour at [27] then found that this view was consistent with the decision in ***Brackenridge***. Justice Evans also found his conclusion was consistent with three decisions which had previously considered the effect of s 46 and s 47(2) of the Tasmanian *Industrial Relations Act 1984* [28] - [31]: ***Hutt v The Cascade Brewery Co Ltd*** A99/1991; ***Neville Jeffress Advertising Pty Ltd v Barlow (No 2)*** A81/1993 and ***Holt v Musketts Timber Sales Pty Ltd*** (1994) 54 IR 323.

92 The decision in ***Jager*** has been criticised as being vitiated by the erroneous premise that the implication in question was one of fact and not law by the learned authors Neil SC and Chin, *The Modern Contract of Employment* (Lawbook, 2012) [11.40]. The authors also point out that special leave from the decision of the Full Court was refused, but not on a ground that touched this point ([11.40], Note 16). Justice Buchanan in ***Wittenberg***, however, did not accept this criticism of the reasoning in ***Jager*** [234].

93 In any event, for reasons that follow, in my respectful opinion, the reasoning or at least the facts in ***Jager*** can be said to be distinguishable as it is clear the task in ***Jager*** was to construe a statutory provision that provided for actual notice, rather than minimum notice.

94 The reasoning of Beazley J in ***Brackenridge*** was also applied by a single judge of the Federal Court in ***Elliott v Kodak Australasia Pty Ltd*** [2001] FCA 807; (2001) 108 IR 23. In ***Elliott***, Marshall J referred to the award provision as prescribing a period of one month's termination pay. His Honour did not, however, find whether the notice provision specified a period of actual notice or a minimum period of notice. His Honour's observations on this issue were brief. He found [91] - [96]:

> The Court received written submissions on the issue of reasonable notice after it reserved its judgment. The central issue concerned whether the award provision relating to notice usurped the implication of a term relating to reasonable notice in Mr Elliott's contract of employment. This called for a consideration of the High Court decision in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; (*Byrne*) and the later decision of Beazley J in *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 67 IR 162 (*Brackenridge*).
>
> In *Byrne* at 422 to 423; their Honours, Brennan CJ, Dawson and Toohey JJ held:
>
> > '*In the absence of any provision in the award* and of any express provision in the contract of employment the law would regard it as a legal incident of the contract that it should be terminable upon reasonable notice or summarily for serious breach.' (Emphasis added.)
>
> Mr Irving submitted that their Honours in the above passage did not intend to remove the possibility of implying a term regarding notice when an award prescribed a minimum period of notice. Mr Irving contended:
>
> > 'In my submission, their Honours were referring in that passage to a situation in which the "provision in the award" or "the express provision in the contract" dealt with the same subject matter as the implied term in a manner that was inconsistent with the implication of the term. In my submission the majority were alluding to circumstances in which the award granted a positive right to an employer to dismiss on the provision of 4 weeks notice . . . They was [sic] not referring to award clauses that granted additional minimum rights to employees similar to the rights granted by section 170CM of the WR Act.'
>
> In reply Mr McDonald relied on Beazley J's judgment in *Brackenridge*. In *Brackenridge*, after considering Byrne, Beazley J held (at 189): '... where an Award governs a particular aspect of employment there is no room for the implication of a term relating to precisely the same subject matter.'
>
> Mr McDonald further noted that Beazley J's judgment in *Brackenbridge* was cited with approval by the Full Court of the Supreme Court of Tasmania in *Australian National Hotels Pty Ltd v Jager* [2000] TASSC 43 (*Jager*). Nor was this aspect of Beazley J's decision disturbed on appeal to the Full Court of the Industrial Relations Court of Australia: *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99.
>
> I do not consider Beazley J was clearly wrong in *Brackenridge* in coming to the view referred to above and am content to follow her Honour's judgment. I therefore reject Mr Irving's submissions on the topic of implied terms. I am fortified in that view by the High Court's refusal to grant special leave in *Jager*: see Application for Special Leave to Appeal in *Jager v Australian National Hotels Pty Ltd* (unreported, H3/2000, 5 April 2001).

95 In ***Elliott***, his Honour did not consider the reasoning in ***Westen v Union des Assurances de Paris (No 2)***, ***Grout v Gunnedah Shire Council (No 2)*** or ***Vermeesch***. On appeal, this point was not raised and the decision of Marshall J was reversed on other grounds of appeal: ***Elliott v Kodak Australasia Pty Ltd*** [2001] FCA 1804; (2001) 129 IR 251.

96 In ***Windross v Transact Communications Pty Ltd*** [2002] FMCA 145, the reasoning in ***Jager*** was distinguished and the reasoning in ***Westen v Union des Assurances de Paris (No 2)*** was applied. Part of a claim in ***Windross*** was a claim for payment in lieu of reasonable notice on grounds that a notice provision that specified actual periods of notice should be construed to have a different effect than a notice period that provides for minimum periods of notice. Clause 17(2) of the claimant's contract in ***Windross*** provided that the employment could be terminated on 'not less than one month's written notice'. Federal Magistrate Driver in ***Windross*** considered a submission made by the parties about the effect of the decision in ***Jager*** including a submission that [56]:

> ... The statutory provision being considered by the Court in *Australian National Hotels Pty Ltd v Jager* was expressed in absolute terms, ie 'a term or period of service of employment ... is terminable by either party by (a) a week's notice, if the wages are payable weekly; ... or (c) a month's notice in any other case.' The language of the statute is expressed in such a way as to leave no room for the implication of further terms. The applicant submits that had the term been expressed as a minimum stipulation, such as for example, '**at least** a week's notice' or '**at least** a month's notice' the Court would have had greater flexibility and arguably would not have been constrained from implying a term giving reasonable notice. On

the facts in *Jager*, the Court found that no injustice had been done to the applicant because he had received a payment equivalent to six months salary in lieu of notice of termination of employment which was in excess of the employer's obligations under the statute.

97 At [57] - [58] Driver FM found:

> In my view, the law concerning the period of notice required to put an end to an employment contract is correctly set out in Macken, McCarry and Sappideen's *Law of Employment* (1997) at pp164-168. The period of notice required may be specified in the contract. Alternatively, the requisite period of notice may be implied from the employer's custom and practice. A minimum period of notice may be prescribed by legislation or an industrial award or agreement. In other circumstances the general law requires that the period of notice must be reasonable.
>
> Where no length of notice is specified, it can be implied. There is authority that the specification of a minimum period of notice leaves room for the implication of reasonable notice of a longer period in an employment contract: *Westen* v *Union des Assurances de Paris* (unreported, Industrial Relations Court of Australia, per Madgwick J, 17 December 1996) at 19-20. It is a question of construction whether the parties intended the express provisions relating to termination to be comprehensive: *New South Wales Cancer Council* v *Sarfaty*. If the parties intended the contractual term to be comprehensive, there will be no implication of a reasonable notice term. If not, then in the absence of an implication of a specific period by reference to custom, a reasonable notice term will be implied.

98 His Honour then found that cl 17(2) of the contract stipulated a minimum period of notice and that the implied term of reasonable notice was not excluded by the express terms of the contract [59].

99 Provisions that specified actual periods of notice continued to be distinguished. In ***Bognar v Merck Sharp & Dohme (Australia) Pty Ltd*** [2008] FMCA 571, the applicant's employment fell within a classification covered by a federal award, the *Commercial Sales (Victoria) Award 1999*, which contained a notice provision. The applicant's contract of employment also expressly provided a period of four weeks' notice to be given by the employer except in the case of serious misconduct. In ***Bognar***, the applicant relied upon the decision of Driver FM in ***Windross*** in support of an argument that the contract and the policy, which provided for a minimum scale of notice periods, enabled a term at law of reasonable notice to be implied. This argument was rejected. Federal Magistrate O'Sullivan, after having regard to the observations made in ***Byrne v Australian Airlines Ltd***, ***Brackenridge***, ***Jager*** and ***Elliott***, found that as the award provision specified an 'actual' period of notice there was no room for the implication of a term as to reasonable notice.

100 The distinction between a provision that specifies minimum periods of notice (which by implication does not exclude an implied term of reasonable notice) and a provision that specifies actual periods of notice (which by implication does exclude an implied term of reasonable notice) was applied to the construction of s 117 of the *Fair Work Act* by Kaye J in ***Guthrie v News Ltd*** [2010] VSC 196; (2010) 27 VR 196. In ***Guthrie***, a clause in Mr Guthrie's employment contract contemplated an appropriate payment of pay in lieu of notice as part of a termination payment. It was argued an appropriate period of notice would be five weeks if s 117(3) of the *Fair Work Act* was to be applied. Justice Kaye rejected this contention and found s 117 of the *Fair Work Act*, if it had applied to Mr Guthrie's contract of employment, would not have excluded a term of reasonable notice. His Honour found [197]:

> In determining the applicable period of notice, I do not consider that much guidance is obtained from the Fair Work Act, upon which Mr Attiwill relied. Section 123(1) provides that Div 11, in which s 117 is located, does not apply to an employee who is employed for a specified period of time. Thus, s 117 would not have applied to Mr Guthrie's contract, in February 2010. Further, and in any event, s 117(3) only provides for the 'minimum period of notice' to be provided to an employee. The Fair Work Act applies to a wide variety of employees. By prescribing the minimum period of notice, the Act does not, it seems to me, cast light on the appropriate period of notice, which should be given to an employee in Mr Guthrie's position. In such a case, the minimum period provided by the Act, namely five weeks, would have been wholly inadequate, in light of the factors which are involved in the assessment at common law.

101 This distinction between provisions that provide for minimum periods of notice and actual periods of notice was rejected by the Full Court of the Supreme Court of South Australia in ***Brennan v Kangaroo Island Council*** [2013] SASCFC 151; (2013) 120 SASR 11; (2013) 239 IR 355. In ***Brennan***, the appellant was employed as a senior manager of the Council. It was common ground that the appellant's employment was subject to the *South Australian Municipal Salaried Officers Award* made under the *Fair Work Act 1994* (SA). Clause 3.2.1.1 of the Award provided that in order to terminate the employment of an employee the employer must give a specified period of notice. It was argued that the *Fair Work Act 1994* (SA) and awards made under that Act merely set minimum standards for employment so that these standards should not preclude the implication of more generous terms into a contract [23]. In that context, counsel had referred to ***Westen v Union des Assurances de Paris (No 2)***. Justice Parker (with whom Vanstone and Anderson JJ agreed) held that the decision in ***Westen v Union des Assurances de Paris (No 2)*** was inconsistent with the decision in ***Byrne v Australian Airlines Ltd***, ***Brackenridge***, ***Elliott*** and ***Jager*** [32] - [33]. Justice Parker applied a test of necessity founded on business efficacy. He said [34]:

> I find that the implication of an obligation to give reasonable notice was not necessary to give business efficacy to the appellant's employment contract. The existence of the award provision, albeit that it operated outside the contract, had the result that the employment arrangement was effective without any need to imply an obligation to give reasonable notice, ie there was no gap that needed to be filled. Furthermore, because of the existence of the award provision it could not be said that implication of such a term would have been accepted by the contracting parties as a matter so obvious as to 'go without saying'.

102 Justice Parker's reasoning assumes that a term governing reasonable notice could only be implied in fact. Thus, it appears his Honour applied the wrong test. Consequently, his reasoning has been criticised by a number of commentators: Irving M, 'Australian and Canadian approaches to the assessment of the length of reasonable notice' (2015) 28 AJLR 159, 160 - 163, Stewart A et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) [22.08].

103 Further, it appears that Parker J's reasoning, in my respectful opinion, is contrary to the observations made in ***Barker*** [28] and ***University of Western Australia v Gray*** [136] where their Honours said that 'business efficacy' does not have a part to play in implying a term in law as such implications do not rely upon an analysis of the specific terms of a contract, but have regard to a class of contracts.

104 In ***Wittenberg***, Buchanan J rejected the criticism of ***Brennan*** on this point, despite considering at some length leading authorities which establish the proposition that a term of reasonable notice is implied in law [218] - [225]. At [234] - [237] his Honour without providing any analysis simply said the issue should be considered in a different way:

> *Jager* and *Brennan* were criticised in written submissions for the employees on the basis that the two Full Courts misunderstood the difference between implications of law and implications of fact. In my view, the criticism is misplaced. The essential point, applicable to both forms of implication in the current circumstances, is that there was no gap to be filled by the implication.
>
> Those various approaches (bearing in mind the statutory source of awards) are consistent with a general statement of principle by the majority in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422-423; 61 IR 32 at 37 (*Byrne*):
>
> > … *In the absence* of any provision in the award and of *any express provision in the contract* of employment the law would regard it as a legal incident of the contract that it should be terminable upon reasonable notice or summarily for serious breach. …
>
> (Emphasis added)
>
> The minority judgment in *Byrne* said (at 449-450; 59):
>
> > … terms of this kind, although treated as implied by law, may be excluded by express provision made by the parties and also as a result of inconsistency with terms of the contract. The result is that, even if treated as rules of law, *they only apply in the absence of an expression of contrary intent*.
>
> (Emphasis added; footnote omitted)
>
> In most cases there will be no practical difference arising from the two formulations as to their particular effect concerning contracts of employment. In each case the possible implication is, in my respectful view, secondary, subordinate and tied to questions of necessity in order to make the contract effectively operative. The implied term of reasonable notice does not represent the imposition of a judicial rule or standard. The courts have not set out to rewrite individual contracts of employment.

105 In this matter before the Full Bench, counsel for the respondents rely not only on the observations made by Buchanan J in ***Wittenberg*** about ***Brennan***, but also point out that an application for special leave to appeal the decision in ***Brennan*** to the High Court was refused. However, I am not sure whether the fact that the High Court refused special leave to appeal assists their argument. The grounds of appeal filed in the High Court were that the Full Court of the Supreme Court of South Australia did not have appropriate regard to the fact that the implied term related to a term of a contract of employment as opposed to a commercial contract: ***Brennan v Kangaroo Island Council*** [2014] HCASL 153.

106 In any event, if the reasoning by Buchanan J in ***Wittenberg*** is applied in this appeal, the question to be answered may perhaps be whether there is a 'gap' to be filled in a contract of employment when regard is had not only to the express terms of the contract, but also is there a 'gap' in, or put another way, does s 117 leave a gap to be filled by an implied term of reasonable notice? This approach appears to have been applied in the recent case of ***Kuczmarski v Ascot Administration Pty Ltd*** [2016] SADC 65.

107 In ***Kuczmarski***, the question whether in light of the minimum period of notice prescribed by s 117 of the *Fair Work Act* should a term entitling the plaintiff to reasonable notice be implied into the contract of employment. In that matter, Clayton J of the District Court of South Australia found [56]:

(a) it was irrelevant that s 117 of the *Fair Work Act* only provides for a minimum period of notice; and

(b) whilst s 117 imposes a minimum obligation it is not 'necessary' to imply the term requiring reasonable notice because Parliament has already imposed an obligation on employers to give a period of notice. Thus, he found there was no relevant 'gap to fill' in light of the operation of s 117.

108 Judge Clayton referred to the decision in ***Westen v Union des Assurances de Paris (No 2)*** and observed that the relevant award in that case provided for specified minimum periods of notice similar to s 117 of the *Fair Work Act* [40]. His Honour also found that if ***Westen v Union des Assurances de Paris (No 2)*** was a current statement of the law he would have been inclined to find that s 117 did not affect the implied contractual right to reasonable notice [43]. He observed that ***Westen v Union des Assurances de Paris (No 2)*** had been disapproved of in ***Brennan*** and, without revealing his reasoning for reaching this conclusion, found that ***Westen v Union des Assurances de Paris (No 2)*** was inconsistent with ***Wittenberg*** [44]. His Honour then declined to follow ***Westen v Union des Assurances de Paris (No 2)*** [44] and said he was bound by ***Brennan*** [71]. Judge Clayton rejected the observations of Kaye J in ***Guthrie*** on grounds the facts in ***Guthrie*** were different. Presumably, Clayton J was referring to the fact that in ***Guthrie***, Mr Guthrie's contract of employment was for a fixed term. However, this distinction does not explain why the observations made by Kaye J in ***Guthrie*** did not require consideration.

109 It is notable, however, that in ***Wittenberg*** Buchanan J did not consider the reasoning in ***Westen v Union des Assurances de Paris (No 2)***. Of importance, Buchanan J was not called upon to consider whether a statutory provision enacted to give effect to the Termination of Employment Convention excluded a term of reasonable notice or whether a statutory provision that provided for minimum periods of notice to terminate a contract of employment as opposed to actual periods of notice when regard was had to the construction of contracts generally or the construction of a particular contract left a 'gap' to be filled by a term of reasonable notice. The issue in ***Wittenberg*** was whether a term requiring reasonable notice could be implied in a

contract and co-exist with an express provision in a contract giving rights of termination on specified actual periods of notice [238]. In Mr Wittenberg's case, it was found that cl 8 of his service agreement (the terms of which had not been abandoned by the parties) provided his employer could terminate his employment by giving six months' notice [281] - [284]. Incorporated into the contracts of three other appellants in ***Wittenberg***, Mr Lawson, Mr Poulos and Ms Murphy, were the terms of a redundancy policy of the employer which contractually entitled each of them to six weeks' pay in lieu of notice [264] - [267].

110 The most recent statement of the effect of s 117 of the *Fair Work Act* is to be found in the judgment of McNab J of the Federal Circuit Court of Australia in ***McGowan v Direct Mail and Marketing Pty Ltd*** [2016] FCCA 2227. In ***McGowan***, McNab J rejected Clayton J's analysis in ***Kuczmarski***.

111 In this appeal, it is argued on behalf of the respondents that the Full Bench should not apply the reasoning in ***McGowan*** as the observations made by McNab J were strictly obiter and not consistent with the views expressed in ***Brennan***.

112 In ***McGowan***, the applicant brought a claim for reasonable notice on termination of his employment with the respondent. The applicant was initially employed as an account manager and entered into a written contract in 1999 which entitled him to specified periods of notice up to four weeks determinable by length of service on termination of employment [19]. His contract also provided that the terms of the contract continued to operate until terminated in accordance with the provisions of this agreement or until superseded by a further agreement which explicitly replaced the agreement [6]. The applicant was subsequently promoted to a position of sales manager in 2009 and then in 2012 to the role of group general manager. On 17 November 2014, his employment was terminated and he was paid five weeks' notice, which is the statutory minimum pursuant to s 117(2) of the *Fair Work Act* [11] and [20]. Judge McNab found the contract entered into in 1999 continued to govern the terms of employment at the date of termination. Consequently, his Honour found there was no basis for implying a term of reasonable notice [67] and [74].

113 Judge McNab, however, then went on to consider the respondent's alternative argument that because of the operation of s 117, this provision prevented the implication of the term of reasonable notice. His Honour rejected this argument. Firstly, he found that ***Brennan*** was distinguishable on the facts as the period of notice was not expressed as 'at least' as it is specified in s 117(2) of the *Fair Work Act*. His Honour then went on to observe that there remains a genuine controversy as to whether s 117 operates so as not to require the implication of a term of reasonable notice where an employee is not employed subject to an award [79]. His Honour had regard to the observations of Clayton J in ***Kuczmarski*** and the application of Buchanan J's reasoning in ***Wittenberg*** about whether a provision left a gap to be filled [80] - [81]. Judge McNab then observed that it was significant that the detailed and comprehensive analysis of the authorities by Buchanan J in ***Wittenberg*** did not state that s 117 operates so as to remove the need to imply a term of reasonable notice in the absence of a contractual term that prescribes notice. Judge McNab then applied a beneficial approach to the construction of s 117 and found [85]:

> I think the better view is that s.117 is in that part of the Act dealing with National Employment Standards and is intended to provide a minimum period only. It does not displace a right to reasonable notice when the contract of employment is silent on the question of notice. By paying or giving the minimum period of notice under s.117(2), the employer will have satisfied the National Employment Standard and not be liable for a claim of breach of those standards. However, it is strongly arguable that payment or provision of that notice will not necessarily satisfy a claim for reasonable notice. The proposition may be tested where the employment of two employees is terminated. Both are over 45 years of age. One has worked for 5 years in a mid-range role, the other has worked for 25 years and worked her or his way up on a high level role. Both are employed under contracts that make no provision for notice of termination. I doubt that parliament intended that both would receive the same period of notice of termination by the enactment of s.117(2) of the Act.

(v) The effect of construing s 117 when read with s 758, s 759, s 760, s 761 and s 762 of the *Fair Work Act*

114 Section 759, when read with s 758, extends s 117 to non-national system employers. Pursuant to s 758, part of the object of doing so is to give effect to, or further effect to the Termination of Employment Convention.

115 Article 11 of the Termination of Employment Convention provides that:

> A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

116 The Termination of Employment Convention does not form part of the *Fair Work Act* as a treaty which has not been incorporated into legislation cannot operate as a direct source of individual rights and obligations under that legislation: ***Minister of State for Immigration and Ethnic Affairs v Teoh*** [1995] HCA 20; (1995) 183 CLR 273, 286 - 287 (Mason CJ and Deane J). However, regard can be had to the Termination of Employment Convention as an aid to statutory interpretation.

117 It is presumed that Parliament normally intends to legislate consistently with Australia's international obligations: ***Polites v Commonwealth*** [1945] HCA 3; (1945) 70 CLR 60, 68 - 69 (Latham CJ), (77) (Dixon J), (80 - 81) (Williams J).

118 Pursuant to s 15AB(1) and s 15AB(2)(d) of *Acts Interpretation Act 1901* (Cth), in the interpretation of a provision of an Act, consideration may be given to any treaty or other international agreement that is referred to in the Act:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision, where the provision is ambiguous or obscure.

119 In ***Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*** [2006] HCA 53; (2006) 231 CLR 1, Gummow A-CJ, Callinan, Heydon and Crennan JJ observed [34]:

> The relevant law of Australia is found in the Act and in the Regulations under it. It is Australian principles of statutory interpretation which must be applied to the Act and the Regulations. One of those principles is s 15AA(1) of the *Acts Interpretation Act 1901* (Cth) (Section 15AA(1) provides: 'In the interpretation of a provision of an Act, a construction

that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.'). Another is s 15AB(2)(d) of that Act. The Convention has not been enacted as part of the law of Australia, unlike, for example, the Hague Rules (See *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 166 [3], 186 [70], 210 [132], 224 [163]) and the Warsaw Convention (See *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 197 [3], 224-225 [107]). Section 36 of the Act is the only section (apart from the interpretation section, s 5) which refers in terms to the Convention. That does not mean that thereby the whole of it is enacted into Australian law. As McHugh and Gummow JJ said in *Minister for Immigration and Multicultural Affairs v Khawar* ((2002) 210 CLR 1 at 16 [45]):

> '[T]he Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.'

Hence, by reason of s 15AB(2)(d) of the *Acts Interpretation Act*, the Convention may be considered for the purposes described in s 15AB(1). Further, Australian courts will endeavour to adopt a construction of the Act and the Regulations, if that construction is available, which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention, as it would with any provision of an international instrument to which Australia is a party and which has been received into its domestic law (*Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 176 [38], 186-187 [71], 213 [137], 227-228 [179]-[180]; *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [25], 230 [128]). The Convention will also be construed by reference to the principles stated in the Vienna Convention on the Law of Treaties (the Vienna Convention) (The Vienna Convention was ratified by Australia on 13 June 1974 and came into force on 27 January 1980 (see Vienna Convention on the Law of Treaties [1974] ATS 2)), even though the Vienna Convention has not been enacted as part of the law of Australia. One of the principles stated in Art 31 of the Vienna Convention (footnote omitted) requires that regard be had to the context, object and purpose of the Convention.

120 In ***Teoh***, Mason CJ and Deane J referred to the principle of statutory construction that if a statute or legislative instrument is ambiguous courts should interpret the provision in a manner that is consistent with Australia's international obligations (287). Their Honours then went on to explain that this principle must lead to a broad view of the concept of ambiguity (287 - 288):

> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (*Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81). The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations (*R v Secretary of State for Home Department; Ex parte Brind* [1991] 1 AC 696 at 748).

121 In ***Kartinyeri v Commonwealth*** [1998] HCA 22; (1998) 195 CLR 337, Gummow and Hayne JJ applied the broad view of Mason CJ and Deane J in ***Teoh*** and stated that [97]:

> [A] statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (*Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287).

122 Whilst Madgwick J in ***Westen v Union des Assurances de Paris (No 2)*** did not refer to s 15AB(1) and s 15AB(2)(d) of the *Acts Interpretation Act 1901* (as perhaps in light of s 170HA of the *Industrial Relations Act 1988* recourse to s 15AB of the *Acts Interpretation Act 1901* was not necessary), his Honour's approach was consistent with an interpretation of the notice provisions in s 170DB of the *Industrial Relations Act 1988* as requiring minimum notice and this is consistent with the requirement in Article 11 of the Termination of Employment Convention to give reasonable notice of termination.

123 In this matter, insofar as s 117 of the *Fair Work Act* extends to non-national system employers, pursuant to s 15AB(1)(a), the text of the Termination of Employment Convention is admissible to confirm the ordinary meaning conveyed by the words in s 117(2), the employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the prescribed period (the minimum period of notice); or

(b) the employer has paid to the employee payment in lieu of the prescribed period of notice.

124 Article 11 of the Termination of Employment Convention in accordance with the rules of the *Vienna Convention on the Law of Treaties* ([1974] ATS 2) must be read in context. Article 4 of the Termination of Employment Convention prohibits the termination of the employment of a worker (an employee) unless there is a valid reason connected with the capacity or conduct of the worker or based upon operational requirements. This provision, however, does not create an international obligation which can be characterised as a right of an employer to terminate the employment of an employee.

125 Thus, it is apparent that Madgwick J in ***Westen v Union des Assurances de Paris (No 2)*** was correct to observe that the ordinary meaning of s 117 is that it imposes minimal obligations upon employers; it does not give them rights. Article 11 refers to an obligation that is to arise in the event an employee is terminated. Section 117 does not give an employer a right to terminate an employee; the right to do is a right conferred by the common law or by the express terms of the contract of employment. At common law an employer only has the right to terminate a contract of employment:

(a) by the giving of proper notice in accordance with the express or implied terms of the contract; or

(b) the employer may terminate the contract immediately without notice where grounds for summary dismissal exist.

126 Thus construed, it is apparent that s 117 is not intended to reduce or affect common law rights and obligations other than to augment the common law right to reasonable notice by establishing a floor that if breached constitutes by the employer a breach of the National Employment Standards.

127 Alternatively, if and when s 117 read as a whole with regard to its object, underlying context, purpose and, in particular, in respect of the latter, its legislative history, it could be said an ambiguity arises as to whether s 117(2) excludes the operation of a common law implied term to give reasonable notice in the absence of an express term. By the use of the words 'minimum notice' in s 117 could be said to leave open the question whether the prescribed periods of notice simply provide for a floor or exclude a more beneficial entitlement to a period of notice (except where the parties to a particular contract expressly agree to greater period than specified in s 117).

128 As Mason CJ and Deane J said in ***Teoh***, if the language of a provision is susceptible of a construction which is consistent with the terms of the international instrument and the obligations imposed on Australia, that construction should prevail. Article 11 imposes an obligation on employers to give reasonable notice. As set out in [….] - [….] of these reasons, what may constitute reasonable notice to terminate the employment of a chief executive officer where relevant factors may result in a long period to obtain alternative employment would not and could not be regarded as the same as reasonable notice to terminate the employment of a low skilled employee whose prospects of obtaining alternative employment are likely to result in a much shorter period of unemployment. Thus, what constitutes reasonable notice to terminate the employment of one employee must be considered in light of all relevant factors. When s 117 is construed in light of Article 11, it is clear that s 117 simply provides a floor that must not be breached by an employer. Put another way, s 117 should not be construed as a provision that specifies actual periods of notice.

129 Even if the provisions of the *Fair Work Act* that extend the application of s 117 to non-national system employers and the Termination of Employment Convention are disregarded, I respectfully do not agree with Clayton J's analysis of s 117 in ***Kuczmarski*** and prefer the reasoning of Kaye J in ***Guthrie*** and McNab J in ***McGowan***. Both Kaye J in ***Guthrie*** and McNab J in ***McGowan*** point out that the minimum periods prescribed in s 117 simply prescribe minimum periods and do not prescribe periods of notice that could be characterised as satisfying a claim for reasonable notice for all classes of employees when the contract of employment is silent on notice. Further, as McNab J points out in ***McGowan***, s 117 simply provides for a minimum standard if complied with by an employer that will satisfy the National Employment Standard and will result in compliance with the Standards.

130 Alternatively, if the reasoning of Buchanan J in ***Wittenberg*** is applied, it is apparent that by prescribing minimum notice periods in s 117 a 'gap' is left to be filled by the implied term of reasonable notice as s 117 does not create a right for an employer to terminate the contract of employment of an employee. In the absence of an express term, an employer must rely upon the common law to do so. Part of that right at common law is the requirement to give reasonable notice. In contrast, one could say that there was no 'gap' to be filled by the legislative provisions in ***Jager*** and the award provision in ***Brennan*** as actual periods of notice were specified.

131 For these reasons, I am of the opinion that s 117 of the *Fair Work Act* does not exclude the common law implied term of reasonable notice in employment contracts in the absence of an express term to the contrary.

(d) Could a period of one week's notice constitute a period of reasonable notice or payment of one week's pay constitute payment in lieu of reasonable notice to Mr Richards?

132 In ***Rogan-Gardiner***, Newnes JA (Allanson J agreed) set out the principles for assessing a period of reasonable notice of termination of an employment contract absent an express provision relating to termination. His Honour observed [43] - [52]:

> It is well-established that where an employer terminates a contract of employment in breach of an obligation to give reasonable notice of termination, the general rule is that the employee is entitled by way of damages to the amount that he or she would have been earned during the period of reasonable notice (less any amounts actually received during that period): ***Bagnall v National Tobacco Corporation of Australia Ltd*** (1934) 34 SR (NSW) 421, 429; ***Gunton v Richmond-upon-Thames London Borough Council*** [1981] 1 Ch 448, 469; ***Dellys v Elderslie Finance Corp Ltd*** [2002] WASCA 161; (2002) 132 IR 385 [39]; *McGregor on Damages* (18th ed, 2009) pars 28-002, 28-006, 28-010.
>
> In accordance with ordinary principles, the employee must take reasonable steps to mitigate his or her loss, the onus of establishing a failure to mitigate being on the employer: ***Harding v Harding*** (1928) 29 SR (NSW) 96, 106; ***Gunton*** (468); ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, 428; ***Dellys*** [39]. In the present appeal, no question of mitigation was raised.
>
> It was not in issue on the appeal that the appellant's contract of employment contained an implied term that the respondent would give reasonable notice of termination, except in circumstances of misconduct justifying summary dismissal: see ***Byrne*** (429). Nor was it in issue that the respondent was in breach of the implied term by failing to give the appellant notice of the termination. The fundamental question on the appeal was whether the primary judge erred in finding that the appropriate period of notice was four months.

The object of a term requiring the giving of reasonable notice to terminate a contract at will was described by the Privy Council in ***Australian Blue Metal Ltd v Hughes*** [1963] AC 74, in the context of a commercial agreement, as follows:

> The implication of reasonable notice is intended to serve only the common purpose of the parties. Whether there need be any notice at all, and, if so, the common purpose for which it is required, are matters to be determined as at the date of the contract; the reasonable time for the fulfilment of the purpose is a matter to be determined as at the date of the notice. The common purpose is frequently derived from the desire that both parties may be expected to have to cushion themselves against sudden change, giving themselves time to make alternative arrangements of a sort similar to those which are being terminated (99).

That has since been applied in respect of a term requiring reasonable notice of termination of an employment contract: see ***Saad v TWT Ltd*** [1998] NSWCA 199; ***Rankin v Marine Power International Pty Ltd*** [2001] VSC 150; (2001) 107 IR 117; ***Guthrie v News Ltd*** [2010] VSC 196; (2010) 27 VR 196 [196]. In ***Rankin***, Gillard J reiterated that the primary purpose of giving a period of notice was to enable the employee to obtain new employment of a similar nature [220]. A like view was expressed by the Queensland Court of Appeal in ***Macauslane v Fisher & Paykel Finance Pty Ltd*** [2002] QCA 282; [2003] 1 Qd R 503 [24], [26]. See also ***Irons v Merchant Capital Ltd*** (1994) 116 FLR 204, 209; ***Harding*** (103).

It is evident that in the present case the parties proceeded on that basis.

The length of the required notice in any case is a question of fact to be decided in the light of the objective circumstances as they exist at the time the notice is, or should have been, given: ***Saad*** and ***Macauslane***.

In the fourth edition of Macken, McCarry and Sappideen, *The Law of Employment* (1997) 166 - 168, the authors state that the considerations which may be relevant to the determination of the period of reasonable notice include the 'high grade' and importance of the position; the size of the salary; the nature of the employment; the employee's length of service; the professional standing, age, qualifications, experience and job mobility of the employee; the expected period of time it would take the employee to find alternative employment; and the period that, apart from the dismissal, the employee would have continued in the employment. The authors note that the factors which are relevant in any particular case must, of course, depend upon the particular facts of the case.

The relevant passages of that text have been cited with approval in a number of cases; see, for instance, ***Saad*** [18]; ***Macauslane*** [27]; ***Rankin*** [223]; ***Guthrie*** [196]; ***Quinn v Jack Chia (Australia) Ltd*** (1992) 1 VR 567, 580; ***Irons*** (208); ***Lau v Bob Jane T-Marts Pty Ltd*** [2004] VSC 69 [65]; ***Sorrell v Kara Kar Holdings Pty Ltd*** [2010] NSWSC 1315 [91] (referring to the 6th ed, 2009, 269 - 272). The factors listed in the current (7th) edition of *The Law of Employment* (289 - 291) do not differ in any material respect from those contained in the 4th ed. The case both at trial and on appeal was fought on the basis of such factors and the appeal should be so determined.

The approach to be taken by an appellate court to a finding by a trial judge as to a reasonable period of notice is not settled. In ***Macauslane*** the Queensland Court of Appeal appears to have taken the view ([2] - [3], [14]) that such a finding involved the exercise of a judicial discretion, which could only be disturbed on appeal by application of the principles in ***House v The Queen*** [1936] HCA 40; (1936) 55 CLR 499, 505. In ***IOOF Building Society Pty Ltd v Foxeden Pty Ltd*** [2009] VSCA 138; (2009) 23 VR 536, the Court of Appeal of Victoria found it was unnecessary to consider whether that was the correct approach [87], although the court was inclined to the view that the preferable approach may be to equate a determination of a period of reasonable notice with an assessment of damages in a personal injuries case; that is, the court must be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous assessment [88]. The court concluded, however, that ordinarily (and in that case) appellate review of a determination as to the reasonable period of notice would be unlikely to lead to a different result depending upon which approach was taken [89].

133 In this matter, an error in law in the reasoning of Beech CC is made out as he found there was no scope for the implication of a term of reasonable notice into Mr Richards' contract of employment. Consequently, Beech CC made no assessment of what period of notice would have been reasonable to terminate Mr Richards' employment.

134 The relevant factors raised in this matter which go to a finding of a relatively short period of notice that could, in the circumstances, be characterised as a reasonable period which may not exceed a minimum period prescribed in s 117 of the *Fair Work Act* are:

(a) Mr Richards did not hold a 'high grade or important position';

(b) but for the dismissal, he would have only been employed for a further two weeks; and

(c) Mr Richards had only been employed for a very short period of three weeks.

135 Balanced against those factors is the uncontested fact that Mr Richards had been induced by Mr Nicoletti when interviewed for the position to move his family together with all their possessions to reside at the farm, in circumstances where Mr Nicoletti had refused an offer by Mr Richards to commence work on trial prior to moving his family to the farm. This circumstance should be considered with the evidence that the provision of accommodation was part of the remuneration of Mr Richards' contract of employment and the cost to Mr Richards of moving his family and possessions from the farm and obtaining alternative accommodation was substantial. In my opinion, consideration of these circumstances results in a longer period of notice then one week to give Mr Richards time to make these arrangements as termination of his employment had the effect of terminating his right to accommodation for himself and his family. When regard is had to these circumstances, I am of the opinion that a reasonable period of notice would have been three weeks.

SCOTT CC

136 I have had the benefit of reading the draft reasons for decision of the Acting President.

137 In respect of FBA 3 of 2016, in the issue of the assessment of compensation for injury arising from the dismissal, I respectfully agree with her Honour's reasons and the order she proposes.

138 In respect of FBA 4 of 2016, I am of the view that there is no room for the implication of a term requiring reasonable notice to terminate the contract of employment.

FBA 4 of 2016 – Implication of a term

139 The important consideration here is that, in the absence of a term within the contract for notice to terminate, there may be a provision within a statute or an award which fills the gap, making the implication of a term unnecessary.

140 It is not in contention that s 117(2) of the *Fair Work Act 2009* (Cth) applies to non-national system employers by the operation of the provisions of various sections of that Act. Her Honour's reasons in [53] – [58] set out those provisions.

141 The question is what is required for the implication of a term of reasonable notice.

142 For a term to be implied in a contract, whether in law or fact, it is required that it be necessary, known as the criterion of necessity (*BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1997) 180 CLR 266 at 283; *Commonwealth Bank of Australia v. Barker* (2014) 253 CLR 169, per French CJ, Bell and Keane JJ at pars 28-29).

143 A number of authorities have considered the issue of the effect of a term for notice in a statute or an award.

144 In *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 67 IR 162 at 188, Beazley J stated:

> In the absence of an express term as to the notice which is to be given upon termination, there is usually an implied term that reasonable notice will be given*: NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 68; 44 IR 1 per Gleeson CJ and Handley JA at 74; 5. In the present case, there was no express term relating to notice. However, the applicant's employment was governed by the *Toyota Australia Vehicle Industry Award 1988*. Clause 5(c) of the Award provided for the periods of notice which the employer was to give upon termination. As has already been observed, terms of an award are not implied into the contract of employment. However, the award still governs the employment to the extent that the express terms of the employment do not make some greater or more beneficial provision. As Brennan CJ, Dawson and Toohey JJ said in *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 800; 61 IR 32 at 35-36 (188 – 9):
>
> > "The award regulates what would otherwise be governed by the contract. But [the award provision is] imported as a statutory right . . . The importation of the statutory right into the employment relationship does not change the character of the right. As Latham CJ points out in his judgment in *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 423, the legal relations between the parties are in that situation determined in part by the contract and in part by the award.
> >
> > ...
> >
> > In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award (See *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284) and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations."
>
> Their Honours further stated (at 801; 37):
>
> > "… a term of an award derives its force, not from agreement between the parties, but from statute. That being so, if a contract of employment is made in reliance upon a provision of an award, it is not a reliance which requires the provision to be made a term of the contract because it already has statutory force."
>
> It follows that where an Award governs a particular aspect of employment, there is no room for the implication of a term relating to precisely the same subject matter. Accordingly, I reject the submission that there was an implied term as alleged.

145 The Full Court of the South Australian Supreme Court in *Brennan v Kangaroo Island Council* [2013] SASCFC 151, per Parker J, with whom Vanstone and Anderson JJ agreed, referred to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, noting that '[t]he issue was whether an award provision requiring that a termination of employment not be harsh, unjust or unreasonable could be implied into a contract' (*Brennan* [29]). Parker J noted that Brennan CJ, Dawson and Toohey JJ held that such terms could not be implied into a contract, stating:

> [T]he answer must be that it is not necessary to imply a term in the form of cl 11(a) for the reasonable or effective operation of the contract of employment in all the circumstances. In the absence of any provision in the award and of any express provision in the contract of employment the law would regard it as a legal incident of the contract that it should be terminable upon reasonable notice or summarily for serious breach. Clause 11(a) may alter that position, but there is no reason to presume that any alteration was intended by the parties to form a term of their contract, nor any reason to impute such an intention to them ... The argument that clause 11(a) constituted an implied term of the contract of employment should be rejected (emphasis added).

(*Brennan* [30])

146 Parker J cited the separate reasons of McHugh and Gummow JJ in *Byrne*, including that '[f]urthermore, despite the lack of "… formality and detailed specificity in the contract" it could not be said that the implication of the award provision into the contract would be necessary for its reasonable or effective operation as there was "no gap which was necessary to fill".' Parker J went on to note that the judgment in *Westen v Union Des Assurances De Paris (No 2)* (1996) 88 IR 268 is inconsistent with *Byrne v Australian Airlines Ltd*, saying that he took the same view of the decision of the Full Court of the Industrial Relations Court of Australia in *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4; (1999) 94 IR 218. He said:

> There the Full Court held that the fact that the relevant industrial award specified a period of notice did not preclude an obligation to give reasonable notice being implied into the contract of employment. However, counsel for the defendant in that case had submitted that the award provision was merely a matter that ought to be taken into account in determining what constituted reasonable notice. That submission appears to have been based on a misunderstanding of an obiter comment by Brennan CJ, Dawson and Toohey JJ in *Byrne v Australian Airlines Ltd* where their Honours referred to what might have been the situation if the relevant award had not provided for termination upon notice.
>
> (*Brennan* [32])

147 His Honour went on to note:

> Counsel for the respondent referred to other cases where, consistently with *Byrne v Australian Airlines Ltd*, a court has refused to imply an obligation to give reasonable notice in circumstances where an award specifies a period of notice, ie *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 67 IR 162 and *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 807; (2001) 108 IR 23. Counsel also referred to the decision of the Full Court of the Supreme Court of Tasmania in *Australian National Hotels Pty Ltd v Jager* [2000] TASSC 43; (2000) 9 Tas R 153. The Full Court refused to imply an obligation to give reasonable notice as the *Industrial Relations Act 1984* (Tas) specified a period of notice. The High Court refused special leave to appeal.
>
> (*Brennan* [33])

148 His Honour found that there was no need to imply a term of reasonable notice to give business efficacy to the contract of employment in that case. The award provision had the result that the employment arrangement was effective without any need to imply any obligation to give reasonable notice, i.e. there was no gap to be filled.

149 I note that the *Fair Work Act*, in s 117, provides for 'the minimum period of notice' and sets out the minimum periods of notice according to the employee's period of continuous service, and for an additional week for an employee who is over 45 years of age and who has completed at least two years' continuous service. In *McGowan v Direct Mail and Marketing Ltd* [2016] FCCA 2227, McNab J dealt with this question as to whether the statute means that there is no requirement to imply a term of reasonable notice where an employee is not employed subject to an award. He referred to the judgement of Buchanan J in *Westpac Banking Corporation v Wittenberg (No 1)* [2016] FCAFC 33; (2016) 256 IR 181 where his Honour found:

> 217 Thus, even in the case of an implication by law into a class of contracts it remains essential, in my respectful view, to bear in mind the "necessity" which compels the implication. And, in both cases, it is accepted that no implication may be made which contradicts the express terms of the particular contract.
>
> 218 It is generally accepted that the common law will imply a term that a contract of employment may be terminated on reasonable notice into such a contract which makes no provision for termination. In the present appeals it was argued that such a term is implied into every contract of employment unless excluded. The two propositions are different. The first is concerned with filling a gap; the second with establishing a position of primary operation.
>
> (*McGowan* [80])

150 In *Wittenberg (No 1)*, a 2016 case, the Full Court of the Federal Court dealt with the issue of the implication of a term of reasonable notice into a contract. Buchanan J, with whom McKerracher and White JJ agreed in this respect, set out and analysed in great detail the history and development of the law. His Honour concluded:

> 233 In *Brennan v Kangaroo Island Council* (2013) 120 SASR 11 ("*Brennan*"), the Supreme Court of South Australia (Full Court) also declined to imply a term of reasonable notice where an award applied, independently of the contract of employment, and prescribed a period of notice.
>
> 234 *Jager* and *Brennan* were criticised in written submissions for the employees on the basis that the two Full Courts misunderstood the difference between implications of law and implications of fact. In my view, the criticism is misplaced. The essential point, applicable to both forms of implication in the current circumstances, is that there was no gap to be filled by the implication.
>
> 235 Those various approaches (bearing in mind the statutory source of awards) are consistent with a general statement of principle by the majority in *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 ("*Byrne*") at 422-423:
>
> > ... **In the absence** of any provision in the award and **of any express provision in the contract** of employment the law would regard it as a legal incident of the contract that it should be terminable upon reasonable notice or summarily for serious breach. ...
> >
> > (Emphasis added.)
>
> 236 The minority judgment in *Byrne* said (at 449-450):
>
> > ... terms of this kind, although treated as implied by law, may be excluded by express provision made by the parties and also as a result of inconsistency with terms of the contract. The result is that, even if treated as rules of law, **they only apply in the absence of an expression of contrary intent.**
> >
> > (Emphasis added.) (Footnote omitted.)

237 In most cases there will be no practical difference arising from the two formulations as to their particular effect concerning contracts of employment. In each case the possible implication is, in my respectful view, secondary, subordinate and tied to questions of necessity in order to make the contract effectively operative. The implied term of reasonable notice does not represent the imposition of a judicial rule or standard. The courts have not set out to rewrite individual contracts of employment.

238 In the present appeals, the question is whether (as the employees submit) a term requiring reasonable notice may be implied into a contract and co-exist with a provision giving rights of termination on specified periods of notice. In my view, such a term of reasonable notice cannot be implied in such a circumstance. It would derogate from existing contractual rights. It would be inconsistent with express terms of the contract. It must be regarded as excluded.

151 Therefore, the question for the implication of a term of reasonable notice comes back to whether there is a gap in the contract which requires to be filled. A statute, or an award having statutory effect, may fill the gap.

152 *Wittenberg (No 1)* did not deal with the issue of whether s 117 of the *Fair Work Act* operates so as to remove the need to imply a term of reasonable notice in the absence of a contractual term that prescribes notice. Section 117 provides a minimum period of notice. In *Kuczmarski v. Ascot Administration P/L* [2016] SADC 65, Clayton AUJ found that even though s 117(2) prescribes a minimum period of notice, nonetheless it prescribed a period of notice. Therefore there was no need to imply a term of reasonable notice as there was no gap to be filled. I respectfully agree.

153 The history of awards throughout Australia is that, with the exception of paid rates awards, the conditions within awards are minimum conditions. That is, the parties to the contract of employment may negotiate conditions which are more beneficial to the employee, but none can be less beneficial (see Creighton B and Stewart A, *Labour Law* (5th ed, 2005) [9.20]).

154 The same applies in this case in respect of the minimum period of notice set out in s 117 of the *Fair Work Act*. It is no different from the minimum conditions set out in an award, which has statutory effect, except that it expressly refers to the period of notice being a minimum.

155 In the circumstances, there is no gap to be filled – there is a period of notice, and accordingly there is no requirement to imply a term of reasonable notice.

Conclusion regarding FBA 4 of 2016

156 The order at first instance in respect of appeal FBA 4 of 2016 was that the application be dismissed. This was because one week's notice was found to be payable under the Award, meaning there was no need to imply a term of reasonable notice. I find, with respect, that although the Award provision was overtaken by the *Fair Work Act* provision and in that regard was in error, the ultimate finding of there being no need to imply a term of reasonable notice was correct. I would dismiss the appeal.

KENNER ASC:

Introduction

157 The appellant Mr Richards commenced two applications before the Commission. The first maintained that he was harshly, oppressively and unfairly dismissed on 23 October 2015 from his position as a stockman employed by the respondent Mr Nicoletti on farming properties. A second claim was made by Mr Richards that he had been denied a contractual benefit of reasonable notice under his contract of employment.

158 The Commission's finding at first instance that Mr Richards was unfairly dismissed is not challenged on these appeals. What is challenged is the award of compensation for injury in the sum of $1,000. This is the subject of the amended ground of appeal in FBA 3 of 2016. Mr Richards contended that the award should be much higher. Insofar as the second appeal in FBA 4 of 2016 is concerned, by the amended ground of appeal, Mr Richards maintained that the Commission's finding at first instance that the contract of service provision in the *Farm Employees' Award 1985* precluded the implication of a term of reasonable notice, was in error. The error alleged, which was a point not taken at first instance, was that the terms of s 117(2), read with Part 6 – 3 Division 3 of the *Fair Work Act 2009* (Cth) overrode the provisions of the Award. The effect of this, as the argument went, was that s 117(2) only provides for a minimum period of notice for all employees covered by its terms, and does not preclude the implication of a greater period of notice at common law.

159 For the following reasons, I would allow the appeal in FBA 4 of 2016 in part. I would allow the appeal in FBA 3 of 2016.

FBA 4 of 2016

160 Whilst the issue of the application of s 117(2) of the *FW Act* appeared to be initially controversial in proceedings before the Full Bench, the respondent, in further written submissions, now accepts that the notice provision of the Award was overridden. Therefore, at the material time, that is at the time of the dismissal of the appellant, the terms of s 117(2) of the *FW Act* applied to the contract of employment between the appellant and the respondent. To that extent, the respondent accepted that the learned Chief Commissioner at first instance was in error in holding that the Award provision applied to oust the common law.

161 As this issue was not taken at first instance, can it be raised now? The issue of jurisdiction of the Commission is always at large and may be raised for the first time on appeal: *SGS Australia Pty Ltd v Trevor Taylor* (1993) 73 WAIG 1760. As it is arguable that this is the basis of the point now taken on appeal, the Full Bench should enable the point to be taken and for it to be determined, despite it not having been raised at first instance.

162 The appellant submitted that the effect of Division 3 of Part 6-3 of the *FW Act* when read with s 109 of the Commonwealth Constitution, is that the relevant provisions of the Award enabling the respondent to give the appellant one weeks' notice of termination did not apply. The submission was that the terms of the Award provision as to notice were rendered inoperative. The further submission was however, that the terms of s 117(2) of the *FW Act*, as extended by s 759 of the *FW Act* to non-national system employers and employees, did not oust the common law implication of a term of reasonable notice. In

particular, the appellant focused on the words "at least" in s 117(2) in support of its submissions. That is, s 117(2) provides a minimum period of notice and not an actual period of notice. Reliance was also placed on a decision of the Industrial Relations Court of Australia in *Westen v Union des Assurances de Paris* (1996) 88 IR 259 at 263. In that case, Madgwick J considered whether the relevant provisions of a federal award as to notice of termination of employment, precluded the implication of a period of reasonable notice at common law. Whilst not needing to finally decide the matter in that case, Madgwick J inclined to the view that the award provision would not prevail over an implied contractual right for reasonable notice. The argument on this appeal was that the same approach should apply in relation to s 117(2) of the *FW Act*.

163 In terms of what reasonable notice should be, the appellant made a number of submissions. He referred to the contract of employment of the appellant providing for an annual salary and for annual leave to be taken annually. Furthermore, reference was made to the seasonal nature of the appellant's work as a farm hand, which would preclude him quickly moving from one location to another to seek other employment. The costs associated with the appellant moving from the respondent's farm, having to borrow money to do this, and also of obtaining alternative accommodation in the meant time, were said to be further relevant considerations in what might be a period of reasonable notice. The overall submission was that these factors weighed against the relatively short period of employment of the appellant, from 5 October to 23 October 2015.

164 As noted, the respondent conceded in its later written submissions to the Full Bench, that the effect of the relevant provisions of the *FW Act* in this case, excluded the notice period of the contract of service clause of the Award. It was accepted that the Award provision, in relation to notice of termination of employment, was no more beneficial to the appellant and therefore, the savings provision in s 762 of the *FW Act*, to the effect that State and Territory laws are not excluded where entitlements in relation to notice of termination of employment are more beneficial to employees, did not have application.

165 However, despite this concession, the respondent submitted that there was no warrant to imply a term at common law of reasonable notice in this case. Reference was made to the decision of the High Court in *Byrne and Frew v Australian Airlines Limited* (1995) 185 CLR 410, as authority for the proposition that a term as to reasonable notice will only be implied into a contract of employment where it is both reasonable and necessary to give the employment contract efficacy. In circumstances where there is a notice of termination provision governing the relationship between the parties, as in the case of s 117(2) of the *FW Act*, there is no necessity to imply such a term at common law, as the employee is entitled to a guaranteed period of notice in accordance with the terms of the statute.

166 In any event, the submission of the respondent was that the terms of the Award in relation to a contract of service, and the provision of notice set out in the Award, reflect a long standing practice in the farming industry. The period of notice of one week, prescribed by the Award, was consistent with the appellant's entitlement under s 117(2) of the *FW Act* in any event. The submission drawn from this was that if any industry practice or custom can be derived from the Award, as to notice of termination of employment, then it is consistent with the appellant's statutory rights, and inconsistent with any surrounding circumstances. As to that matter, the respondent submitted that contrary to the appellant's contentions, the particular circumstances relied on by the appellant to support the implication of a term of greater notice were insufficient. Furthermore, it was also maintained that the factors relied on by the appellant, such as the need to borrow money to relocate are purely subjective matters, and could not be relied on to support the implication of a term of greater notice in this case.

167 Accordingly, the respondent contended that the terms of s 117(2) of the *FW Act* provided for one weeks' notice of termination of employment. Given that this was the end result of the case at first instance, by the operation of the Award provision, the outcome would be no different whether the Award or *FW Act* provision applied. To that extent, there was no warrant in disturbing the order at first instance, as the submission went.

168 It is trite to observe that an award or statutory provision applicable to an employment relationship operates on a contract of employment once formed. As such, an award or statutory provision, unless expressly provided, are not incorporated into and do not form part of a contract. In cases of breach, the remedy is to enforce the terms of the award or statutory provision, not the contract of employment itself: *Byrne*.

169 The approach in *Westen*, upon which the appellant relied, was not followed in a later decision of the Court in *Brackenridge v Toyota Motor Corporation Australia Limited* (1996) 67 IR 162. In that case, Beazley J considered a claim for reasonable notice in the Court's associated jurisdiction, arising from the termination of an employee's employment. The employment was governed by the terms of a federal award. As to notice of termination of employment, Beazley J held, in applying *Byrne*, that as the award governed the relationship between the parties in respect of notice of termination, there was no room for the implication of a term of reasonable notice.

170 However, in an earlier decision of the Court, in *Grout v Gunnedah Shire Council (No 2)* (1995) 58 IR 67, Moore J considered that the terms of s 170DB of the former *Industrial Relations Act 1988* (Cth) did not preclude the implication of a period of notice at common law. His Honour in that case attached significance to the fact that the then s 170DB did not invest the employer with a statutory right to terminate the contract of employment. It specified only a minimum entitlement to notice, leaving room for the common law to operate.

171 In more recent cases, for example a decision of the Full Court of the Tasmanian Supreme Court in *Australian National Hotels Pty Ltd v Jager* (2000) 9 Tas R 153, it was held that the terms of the Tasmanian industrial statute providing notice of termination of employment did not permit the implication of a term of reasonable notice. A similar conclusion, albeit in applying an award provision as to notice of termination, was reached by the Full Court of the Supreme Court of South Australia in *Brennan v Kangaroo Island Council* (2013) 120 SASR 11. In *Brennan*, the Full Court concluded that the approach taken in *Westen* was inconsistent with the decision of the High Court in *Byrne* and it should not be followed. Also, the Full Court referred to with approval, both decisions in *Brackenridge* and *Jager*, along with the decision of the Industrial Relations Court of Australia in *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23. In the latter case, the Court had refused to imply a term as to reasonable notice in the face of an award term dealing with the same subject matter.

172 Regardless of whether the implication of a term into a contract is based on factual implication, as in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of The Shire of Hastings* (1977) 180 CLR 266 at 283, or as a matter of law, based on the nature of the contract itself, it has been repeatedly held that the implication must be "necessary" in both cases: *Westpac Banking Corporation v Wittenberg* (2016) 330 ALR 476 per Buchanan J at pars 216-217. In this respect, most recently, French CJ, Bell and Keane JJ in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, observed at pars 28-29 as follows:

> 28 An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams* [109] , some implications in law derive from the implication of terms in specific contracts of particular descriptions, which become "so much a part of the common understanding as to be imported into all transactions of the particular description"[110] . The two kinds of implied terms tend in practice to "merge imperceptibly into each other"[111] . That connection suggests, as is the case, that the "more general considerations" informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of "necessity", which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary "to give business efficacy" to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what "the contract actually means".
>
> 29 In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the "necessity" which will support an implied term in law is demonstrated where, absent the implication, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined"[112] or the contract would be "deprived of its substance, seriously undermined or drastically devalued"[113] . The criterion of "necessity" in this context has been described as "elusive"[114] and the suggestion made that "there is much to be said for abandoning"[115] the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary [116] . The same constraints apply whether or not such implications are characterised as rules of construction.

173 Thus "necessity" in this context, has been held to mean, in the situation of implication by the operation of law, the circumstance where the absence of such a term would render the particular contract "nugatory or worthless, or be seriously undermined if no implication is made". Furthermore, the relevant "necessity" is broader than that applicable to the necessity for "business efficacy" in relation to the implication of terms in fact: *University of WA v Gray* (2009) 179 FCR 346 at pars 135-142.

174 In *Wittenberg*, Buchanan J, after a detailed consideration of authorities in both the United Kingdom and Australia in relation to the implication of a term of reasonable notice in employment contracts, and some of those mentioned in submissions on this appeal, concluded the issue is to be approached from the point of view of whether there were gaps to be filled in the contract by the implication of a term. In particular, at pars 234-237, his Honour said:

> **[234]** *Jager* and *Brennan* were criticised in written submissions for the employees on the basis that the two Full Courts misunderstood the difference between implications of law and implications of fact. In my view, the criticism is misplaced. The essential point, applicable to both forms of implication in the current circumstances, is that there was no gap to be filled by the implication.
>
> **[235]** Those various approaches (bearing in mind the statutory source of awards) are consistent with a general statement of principle by the majority in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 131 ALR 422 (*Byrne*) at CLR 422–3; ALR 428:
>
> > … **In the absence** of any provision in the award and **of any express provision in the contract** of employment the law would regard it as a legal incident of the contract that it should be terminable upon reasonable notice or summarily for serious breach. … (Emphasis added.)
>
> **[236]** The minority judgment in *Byrne* said (at CLR 449–50; ALR 449): … terms of this kind, although treated as implied by law, may be excluded by express provision made by the parties and also as a result of inconsistency with terms of the contract. The result is that, even if treated as rules of law, **they only apply in the absence of an expression of contrary intent.** (Emphasis added.) (Footnote omitted.)
>
> **[237]** In most cases there will be no practical difference arising from the two formulations as to their particular effect concerning contracts of employment. In each case the possible implication is, in my respectful view, secondary, subordinate and tied to questions of necessity in order to make the contract effectively operative. The implied term of reasonable notice does not represent the imposition of a judicial rule or standard. The courts have not set out to rewrite individual contracts of employment.

175 Whilst the terms of s 117(2) of the *FW Act* was not the subject of specific consideration in *Wittenberg*, in my view, this case, and those referred to in it, represent the general applicable principles. That is, it is only in cases where no provision is made for notice in a contract of employment, or applies to the employment relationship, is there scope for the implication of a term as to reasonable notice. Thus, it is only where there is a gap in the employment relationship in relation to notice of termination of employment, that the common law will operate to fill it. I do not think it can be said that by not implying a term as to reasonable notice as contended by the appellant, the operation of the contract of employment between the appellant and the respondent would have been "seriously undermined"; "rendered nugatory" or "worthless", in the sense that those concepts are to be understood: *Byrne* at 450.

176 Some reference was made in argument to the fact that s 117(2) of the *FW Act* merely provides for a minimum period of notice and the use of the words "at least" are significant. It means that there is still room for the implication of a term providing a greater period of notice than that provided by the statute. As to the use of the words "at least" in s 117(2)(a) of the *FW Act*, and the fact that the statutory provision provides for a minimum period of notice of termination of employment, I agree, with respect, with the conclusions and observations of Clayton J of the District Court of South Australia in *Kuczmarski v Ascot Administration P/L* [2016] SADC 65, at pars 55-62, a case referred to by the parties in this appeal. In that case, the terms of s 117(2) of the *FW Act* were in issue. The plaintiff claimed the defendant failed to provide reasonable notice on termination of employment on the grounds of redundancy. The claim was mounted on the basis that while s117(2) of the *FW Act* applied, it did not preclude the implication of a greater period of notice at common law, based on the contention that s 117(2) only prescribed a minimum period of notice, by the use of the words "at least" in the subsection.

177 The defendant resisted the claim on the basis that, in applying the principles discussed in *Barker*, such implication was not necessary. In considering the competing contentions of the parties, Clayton J, in applying many of the authorities referred to above, preferred the approach of the defendant. In particular, his Honour concluded at pars 54-58, that he accepted the submission of the defendant that reliance on the fact that s 117(2) only prescribes a minimum period of notice, was not to the point. Irrespective of this, it was not necessary to imply the further term of reasonable notice because there was no gap to be filled, as s 117(2) operated according to its terms and provided a period of notice to apply. Thus, the Parliament has legislated to fill any gap and requires employers to provide the specified period of notice of termination of employment. Furthermore, the contention put by the defendant in *Kuczmarski* that the existence of s 117(2) of the *FW Act* excludes and displaces the implied term and enables the parties to agree on a greater period of notice, was accepted.

178 A further recent decision referred to by the parties was of the Federal Circuit Court in *McGowan v Direct Mail and Marketing Pty Ltd* [2016] FCCA 2227. In this case, a claim was made by the applicant in an adverse action claim, for damages under s 340(1)(a)(ii) of the *FW Act* and also for reasonable notice of termination of employment under his contract of employment. As to the claim for reasonable notice, McNab J held that whilst the applicant had had a number of promotions and job changes with the same employer since his initial employment in 1999, the original contract notice provision continued to apply. There was thus no room for the implication of a period of reasonable notice. In the alternative, McNab J considered a further submission of the respondent that in any event, despite the terms of the 1999 contract, s 117(2) of the *FW Act* applied and in reliance on many of the cases mentioned above, there was no scope for the implication. At pars 79-85, McNab J referred to the controversy in the cases as to whether a term of reasonable notice should be implied into an employment contract, in the face of an award or statutory term as to notice. In obiter observations at par 85, his Honour expressed his preference for the view that s 117(2) of the *FW Act* does not oust the common law term of reasonable notice. In particular, reference was made to the situation of a more senior long standing employee compared to an employee with considerably shorter service and it could not have been the intention of Parliament that both employees would receive the same notice period. Given my agreement the conclusions reached by the court in *Kuczmarski*, with respect, I consider that approach is preferable to the obiter observations of McNab J in *McGowan*.

179 In the case of the operation of s 117(2) of the *FW Act*, the Commonwealth Parliament has, by the terms of Division 3 of Part 6-3 of the *FW Act*, extended it to non-national system employers, as in the present case. Having done so, to the extent that the laws of a State or Territory do not provide more favourable terms, as referred to in s 762, the Commonwealth Parliament has filled any "gap" in the employment relationship concerned. Further, in providing for a minimum period of notice, there is nothing precluding the parties to a contract of employment from agreeing to a period of notice more generous than that provided for in s 117(2). This the same as is the case of an award provision dealing with notice. Both are minimum periods. Whether the language is expressed as an actual period or a minimum period, the practical effect is the same. An employer providing a lesser period of notice is in breach of the statute or the award as the case may be, but is not in breach of the contract of employment, unless under the terms of the contract in question, there is express incorporation. In either case of an actual or minimum period of notice being specified, an employer is at liberty to provide a greater period of notice if it chooses to do so.

180 Therefore, in conclusion, whilst I accept that having regard to the provisions of the *FW Act*, cl 5 of the Award did not apply, there is no basis to conclude that the employment relationship between the appellant and the respondent was such that a term as to reasonable notice should have been implied, in addition to the express requirements of s 117(2). To the extent only that the learned Chief Commissioner erred as to the applicable law, I would allow this ground in part.

FBA 3 of 2016

181 The Commission at first instance awarded the appellant compensation for injury in the sum of $1,000. The learned Chief Commissioner concluded that he was not aware of a similar case to that before him. He referred to a decision of Harrison C in *Golding v PIHA Pty Ltd* (2004) WAIRC 12971; (2004) 84 WAIG 3639 where the sum of $500 was awarded for injury for shock and humiliation as a result of the abrupt manner of a dismissal in that case.

182 The appellant contended that the Commission erred in the assessment of compensation for injury. The Commission found that the conduct of Mr Nicoletti, for the respondent, involved threats and intimidation of the appellant, leading to both he and his partner Ms Evans fearing for their safety. Ms Evans called the police. Also, an Apprehended Violence Order was taken out by the appellant. The Commission also found at par 144 of its reasons that the post-dismissal conduct of Mr Nicoletti towards the appellant, primarily in connection with the appellant and Ms Evans vacating the house they occupied on the respondent's farm, was as a direct result of and part of the dismissal. Thus there was a positive finding in relation to causation.

183 The learned Chief Commissioner found at par 145 that the conduct of Mr Nicoletti caused the appellant to fear for his safety and for that of Ms Evans. The Commission also found that the appellant did not sleep properly, was stressed and was not coping. A finding was also made that the cause of the appellant's stress was not just in relation to himself, but also in relation to the impact of the events on Ms Evans, in particular the requirement to vacate the farm accommodation.

184 The learned Chief Commissioner referred to authorities of the Commission in relation to compensation for injury and the breadth of the concept: *Capewell v Cadbury Schweppes Aust Ltd* (1997) 78 WAIG 299. He also referred to the need for evidence of injury beyond what might be expected to flow from an unfair dismissal in the ordinary course: *AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849.

185 In the case of an appeal from a discretionary decision, it is necessary for the appellant to demonstrate error. The error may be as to the facts, acting on a wrong principle or failing to have proper regard to relevant factors or taking into account matters not relevant: *House v R* (1936) 55 CLR 499. It may also be the case that whilst specific error is not able to be identified, error may be inferred in circumstances where the result of a decision is plainly unjust: *Australian Coal and Shale Employees' Federation v Commonwealth* (1953) 94 CLR 621. It is not enough for the decision under appeal to be set aside simply because an appeal court may take an alternative view on the facts and come to a different decision: *Fire and All Risks Insurance Co Ltd v Rousianos* (1989) 19 NSWLR 57.

186 In assessing compensation for loss and/or injury, each case will turn on its own facts. The relevant principles for the assessment of compensation for loss and injury are well settled (see *Ramsay Bogunovich v Bayside Western Australia Pty Ltd* (1998) 79 WAIG 8; *Capewell*; *AWI*; *Lynam v Lataga Pty Ltd* (2001) 81 WAIG 986; *AWI Administration Services Pty Ltd v Birnie* (2001) 81 WAIG 2849; 2862). The Full Bench recently summarised these principles in *Scicluna v William Paul Brookes t/as Bayview Motel Esperance WA* [2016] WAIRC 00862. Whilst there is no "tariff" or specified range from the cases, as to what may be seen as adequate compensation in any given case, it is at least possible to discern from them a continuum of conduct or behaviour and resultant injury in the case of a claim for loss on that basis. Importantly, the focus needs to be kept on the impact of the conduct on the employee, when considering any injury suffered as a causal effect of the unfair dismissal. For example, in *Lynam* at pars 49-64 the Full Bench found that the employee was locked out of the retail store of which he was a manager; was precluded from speaking to other staff; and the employer threatened to call the police if he returned; and there was evidence of the employee being placed under great stress and was grinding his teeth at night. In that case the Full Bench found that the employer engaged in a callous, oppressive and humiliating course of conduct. An award for injury was made in the sum of $4,500 however the appellant was prepared to accept, and the Full Bench awarded, the lesser sum of $3,500.

187 In *Bogunovich*, Sharkey P found at pp 11-12 (Kenner C agreeing) that the appellant suffered mental distress, anxiety and loss of dignity and self-esteem. Compensation for injury in this case was assessed at $5,000. In *AWI*, the Full Bench upheld an award of compensation for injury of $5,000 by the Commission at first instance in circumstances where the employee was made redundant without prior notice, having been told the day prior that he had good career prospects and was shocked and distressed by the employer's conduct. Also in that case, the employee's shock and distress was made worse by the employer's refusal to subsequently discuss relevant matters in relation to the redundancy with the employee.

188 In the cases just cited, it is open to conclude that there have been substantial awards of compensation for injury evidenced by particularly poor conduct of the employer, resulting in an identifiable impact on the employee, established on the evidence.

189 In the present case, based on the findings of the learned Chief Commissioner, in comparison to a number of Full Bench decisions such as those cited above, the conduct of Mr Nicoletti of the respondent, must be regarded on any measure, as very poor conduct, and towards the upper end of the scale. The impact on the appellant, including his concern for Ms Evans, was, on the evidence and the findings made by the Commission, substantial and warranted a significant award of compensation for injury. I consider that the assessment of $1,000 compensation was, in all the circumstances of this case, erroneous. Whilst the learned Chief Commissioner referred to the relevant principles, it is open to conclude that in view of the findings made by the Commission, that the exercise of discretion miscarried, leading to a result that was in all the circumstances unjust. I consider that an award of $6,000 compensation for injury would be appropriate.

Determination of the appeals

190 For the reasons given by each of the members of the Full Bench, orders should be made in FBA 3 of 2016 that:

(a) The appeal be upheld.

(b) The decision in Order [2016] WAIRC 00248; (2016) 96 WAIG 504 be varied by deleting the sum of '$3,991.72' and substituting the sum of '$8,991.72'.

191 For the reasons given by Scott CC and Kenner ASC, an order should be made to dismiss FBA 4 of 2016.

2016 WAIRC 00946

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DARREN RICHARDS
	APPELLANT
	-and-
	GB & G NICOLETTI
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 20 DECEMBER 2016 (CORRIGENDUM - TUESDAY, 20 DECEMBER 2016)
FILE NOS	FBA 3 OF 2016, FBA 4 OF 2016
CITATION NO.	2016 WAIRC 00946

Result	Corrigendum issued
Appearances	
Appellant	Mr G McCorry, as agent
Respondents	Mr C J Graham (of counsel) and Mr S Sirett (of counsel)

Corrigendum

1. Delete from DATE DELIVERED: 'TUESDAY, 22 DECEMBER 2016' for the Reasons for Decision [2016] WAIRC 00941 and insert 'TUESDAY, 20 DECEMBER 2016'.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

Dated: Tuesday, 20 December 2016

2016 WAIRC 00959

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 188 OF 2015 GIVEN ON 27 APRIL 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DARREN RICHARDS
	APPLICANT
	-v-
	GB & G NICOLETTI
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 20 DECEMBER 2016
	CORRIGENDUM - THURSDAY, 22 DECEMBER 2016 - [2016] WAIRC 00941
FILE NOS	FBA 3 OF 2016, FBA 4 OF 2016
CITATION NO.	2016 WAIRC 00959

Result	Corrigendum issued
Appearances	
Appellant	Mr G McCorry, as agent
Respondents	Mr C J Graham (of counsel) and Mr S Sirett (of counsel)

Corrigendum

1. In [128], line 4 [2016] WAIRC 00941 of the Reasons for Decision, delete '[….] - [….]' and replace with '[80], [82], [100] and [113]'.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

Dated: Thursday, 22 December 2016

2016 WAIRC 00942

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DARREN RICHARDS
	APPELLANT
	-and-
	GB & G NICOLETTI
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
DATE	TUESDAY, 20 DECEMBER 2016
FILE NO.	FBA 4 OF 2016
CITATION NO.	2016 WAIRC 00942

Result	Order issued
Appearances	
Appellant	Mr G McCorry, as agent
Respondents	Mr C J Graham (of counsel) and Mr S Sirett (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 17 August 2016 and 19 September 2016, and having heard Mr G McCorry, as agent on behalf of the appellant, and Mr C J Graham (of counsel) on behalf of the respondents on 17 August 2016 and Mr S Sirett (of counsel) on behalf of the respondents on 19 September 2016, and reasons for decision having been delivered on 20 December 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

By the Full Bench

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

2016 WAIRC 00961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK DARREN RICHARDS
	APPELLANT
	-and-
	GB & G NICOLETTI
	RESPONDENTS
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
DATE	THURSDAY, 22 DECEMBER 2016
FILE NO.	FBA 3 OF 2016
CITATION NO.	2016 WAIRC 00961

Result	Order made
Appearances	
Applicant	Mr G McCorry, as agent
Respondents	Mr C J Graham (of counsel) and Mr S Sirett (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 17 August 2016 and 19 September 2016, and having heard Mr G McCorry, as agent on behalf of the appellant, and Mr C J Graham (of counsel) on behalf of the respondents on 17 August 2016 and Mr S Sirett (of counsel) on behalf of the respondents on 19 September 2016, and reasons for decision having been delivered on 20 December 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal be upheld.
2. The decision in Order [2016] WAIRC 00248; (2016) 96 WAIG 504 be varied by deleting the sum of '$3,991.72' and substituting the sum of '$8,991.72'.

By the Full Bench

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

FULL BENCH—Unions—Application for registration—

2016 WAIRC 00966

AMALGAMATION OF THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00966
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	MONDAY, 7 NOVEMBER 2016; WEDNESDAY, 14 DECEMBER 2016
DELIVERED	:	FRIDAY, 23 DECEMBER 2016
FILE NO	:	FBM 2 OF 2016
BETWEEN	:	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS Applicants AND (NOT APPLICABLE) Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 72 of the *Industrial Relations Act 1979* (WA) - Amalgamation of two registered employee organisations - Principles applicable to an application to intervene considered - Application by federal registered organisation to intervene dismissed on grounds of insufficient interest - Notices of objection filed on behalf of persons not members of the applicants dismissed on grounds no standing to object - Notices of objection filed on behalf of members dismissed on grounds not satisfied leave should be granted to allow notices out of time - Application complies with the requirements of the *Industrial Relations Act 1979* - Registration of new organisation approved
Legislation	:	*Industrial Relations Act 1979* (WA) s 6(a), s 6(c), s 6(e), s 7, s 27(1)(k), pt II div 4, s 53, s 53(1), s 55, s 55(1), s 55(2), s 55(3), s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 58(2), s 59, s 63(1)(a), s 63(1)(b), s 64A, s 64B, s 64B(1), s 64C, s 66, s 72, s 72(1), s 72(2), s 72(3), s 72(5) *Industrial Arbitration Act 1912* (WA) s 9(a) *Industrial Arbitration Act 1979* (WA) s 6 *Industrial Relations Commission Regulations 2005 (WA) reg 37, reg 68(4)* *Fair Work (Registered Organisations) Act 2009* (Cth) *Fair Work Act 2009* (Cth)
Result	:	Orders issued

Representation:

Applicants	:	Mr C Young and Mr M Zoetbrood on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
		and
		Mr D Rafferty (of counsel) and with him Mr P O'Keeffe on behalf of The Food Preservers' Union of Western Australian Union of Workers
		and
		Mr C Fogliani (of counsel) on behalf of Ms A Ristevska, Mr B Rizzo and Mr G Tupluk

Case(s) referred to in reasons:

Gairns v The Royal Australian Nursing Federation Industrial Union of Workers, Perth (1989) 69 WAIG 2343

R v Holmes; Ex parte Public Service Association (NSW) [1977] HCA 70; (1977) 140 CLR 63

Re Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division [1985] HCA 31; (1985) 155 CLR 513; (1985) 13 IR 86

Re The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA (1990) 70 WAIG 3974

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

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA [2012] WAIRC 00845; (2012) 92 WAIG 1713

Case(s) also cited:

Western Australian Railway Officers' Union and Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch [2010] WAIRC 00417; (2010) 90 WAIG 596

Reasons for Decision

FULL BENCH:

Introduction

1 This is an application by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWUWA) and The Food Preservers' Union of Western Australia Union of Workers (FPU) to amalgamate filed on 8 September 2016. Each organisation is an employee organisation registered under the *Industrial Relations Act 1979* (WA) (the IR Act) and makes application under pt II, div 4 of the IR Act for the registration of a new organisation pursuant to s 72 of the IR Act to be called The Australian Workers' Union, West Australian Branch, Industrial Union of Workers. As at 12 October 2016, the AWUWA had 7,100 members and the FPU 268 members (statutory declaration, Michael Johannes Zoetbrood, secretary of the AWUWA, made on 12 October 2016).

2 The application was heard on 7 November 2016. At the conclusion of the hearing the matter was adjourned for the Full Bench to consider the matter and deliver its decision on the basis that the parties had put forward all evidence and material in support of the application. However, subsequent to the hearing 15 notices of objection to the application were filed and served on 14 November 2016 which resulted in the FPU filing two affidavits sworn by the secretary of the FPU, Peter Francis O'Keeffe, and a further hearing on 14 December 2016 to determine whether:

(a) some of the persons who signed notices of objection had standing to object; and

(b) the remaining persons who signed notices of objection who were members of the FPU should be granted leave to object out of time.

3 At the conclusion of the hearing on 14 December 2016, the Full Bench informed the parties and Mr Fogliani who appeared on behalf of three of the persons seeking to object to the application to amalgamate, that the notices of objection would be dismissed and an order would be made to authorise the registration of a new amalgamated organisation.

4 The reasons why the Full Bench made the orders it did at the conclusion of the hearing of this application are as follows in these reasons.

Background - the reasons why the FPU seeks to amalgamate with another organisation

5 In early 2016, an issue arose whether the members of the committee of management of the FPU validly held office as an annual general meeting and elections for offices (other than the secretary) had not been held in 2015. With the exception of the secretary, under r 7 each officer holds office for a period of 12 months from the conclusion of each annual general meeting. As a result, Mr O'Keeffe, as a member of the FPU, brought an application pursuant to s 66 of the IR Act seeking orders to enable an annual general meeting of the FPU to be called, an interim committee of management and a process for elections of office holders to be put in place (PRES 1 of 2016).

6 After hearing the parties on 18 March 2016, the following interim order was made in PRES 1 of 2016 on 21 March 2016 ([2016] WAIRC 00159; (2016) 96 WAIG 310):

1. Rule 6 of the rules of the respondent (the rules of the Union) is varied in that an Interim Committee of Management is established, constituted as follows:

(a)	President	Bishir Ahmed
(b)	Senior Vice President	Ibrahim Taha
(c)	Junior Vice President	Cylynn Criddle
(d)	Secretary	Peter O'Keeffe
(e)	Treasurer	Adnan Alsudani
(f)	Trustees	Alene Ayanaw
(g)	Committee Members	Dusan Dragosavic Phe Ta Sarah-Emily Enua

2. The Interim Committee of Management is to remain in place until elections for office are conducted in accordance with the rules as varied by orders 3 and 4 of this order.

3. Rule 11 of the rules is varied in that an Annual General Meeting of the Union is to be held in accordance with the terms of rule 11 in the month of May 2016.

4. Rule 21(1) of the rules is varied in that the notice for nominations for office for elections to be conducted in accordance with order 3 of this order and the rules, are required to be displayed in the manner required by the Interim Committee of Management on a date not earlier than 24 March 2016.

5. Rule 7(1) of the rules is varied in that following the election for each office conducted in accordance with orders 3 and 4 of this order and the rules, each member of the Committee of Management (other than the Secretary) shall hold office for a period of approximately eighteen (18) months, namely from the conclusion of the Annual General Meeting conducted in May 2016 at which he or she is declared duly elected to the conclusion of the next Annual General Meeting in November 2017, when he or she shall retire from office but shall be eligible for re-election.

6. The Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the Committee of Management and each of the members of the Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.

7. Unless this order is revoked or varied, this order shall cease to have effect at the commencement of the Annual General Meeting held in the month of November 2017.

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

7 Pursuant to the terms of the order in PRES 1 of 2016, elections were held between 24 March 2016 and 29 April 2016. Mr Ben Harris, the returning officer for the FPU elections, after conducting the elections, declared the results on 5 May 2016 (annexure 2, statutory declaration of Mr O'Keeffe).

8 In a letter and attachments written by Mr O'Keeffe, as the secretary of the FPU, to all members of the FPU dated 17 June 2016, the following reasons why the FPU seeks to amalgamate with the AWUWA were put to the members:

(a) The FPU has been for many years run administratively by The Shop, Distributive and Allied Employees' Association of Western Australia (SDAWA) through the operation of a service agreement. Mr O'Keeffe is also the secretary of the SDAWA.

(b) For some years, the FPU has only had a membership of approximately 250. They tried for several years unsuccessfully to increase their membership. The committee of management formed the view there was little prospect of any increase in the coming years. As the FPU for many years has failed to increase their membership coupled with low numbers resulted in the resources of the union dwindling. As of April 2016, the FPU had total membership funds of $27,150.

(c) The FPU reduced expenses by reducing the secretary's wage from $10,400 per annum to zero and the SDAWA took on more of the cost of employment of the FPU organiser, Mr Suliman Ali. This meant that Mr Ali spent more time working for the SDAWA than for the FPU.

(d) The committee of management formed the view that its only real option for its viability was to increase membership fees in the order of 100%, but that was not likely to be supported by the membership as a whole so that idea was rejected.

(e) The other option was to amalgamate with another union. Despite the fact that the FPU having a close relationship with the SDAWA over the years, the committee of management was of the opinion that the rules of the SDAWA do not permit it to cover members working in FPU areas of work and so the SDAWA was not a viable option.

(f) The committee of management authorised Mr O'Keeffe to commence discussions with the AWUWA to see if they would be open to an amalgamation with the FPU.

9 Prior to July 2016, there were nine sites at which members of the FPU worked. However, in July 2016 two workplaces, Smiths and Golden Egg, closed. These closures resulted in a loss of about 30 members of the organisation.

Rules of the proposed amalgamated organisation

10 The rules of the proposed amalgamated organisation, with the exception of the following rules, are identical to the current registered rules of the AWUWA:

(a) Rule 4(40) and r 4(41) of the proposed rules set out, without amendment, the existing eligibility rules of the FPU (r 4 (membership) and r 3 (interpretation) respectively of the rules of the FPU).

(b) The following proviso is added to proposed r 4 which states:

> PROVIDED that no person shall be eligible to be a member of the Union unless they were eligible to be a member of:
>
> The Australian Workers' Union, West Australian Branch, Industrial Union of Workers;
>
> or
>
> The Food Preservers' Union of Western Australia, Union of Workers
>
> As at the date of the amalgamation of the two Unions on *[date of amalgamation]*

(c) Rule 36 and r 50 of the current rules of the AWUWA require publication of notices in The Australian Worker. Rule 36 of the proposed rules instead requires publication of a notice of a proposed alteration to rules in The West Australian newspaper. The same requirement for publication in r 50 is also proposed.

Eligibility rule for FPU members of the proposed amalgamated organisation

11 Rule 4(40) and r 4(41) of the proposed rules provide:

> Subject to sub clause (41) the Union shall consist of an unlimited number of persons comprising those-
>
> (a) who are employed in the manufacture, packing, bottling, blending, refining, pulping, brewing, mixing, the following:- pastry, confectionery, biscuits, cakes, cake ornaments, ice, ice cream, grocers' sundries, chemists' sundries.
>
> (b) who are engaged in processing by canning, quick-freeze, or other methods of preservation of poultry, rabbits, game, fruit, vegetables, fish including crustaceans and molluscs or any part thereof.
>
> (c) who are employed or usually employed in or in connection with the handling, candling, grading, packing, pulping, dehydrating, oiling or by any other method processing eggs, with the exception of transport workers, worked engaged in any clerical capacity, or workers employed in or about warehouses which do not deal solely in eggs or workers employed in or about retail shops.
>
> (d) who are employed assisting in the production or putting up for sale the products or wares of factories or establishments manufacturing and/or dealing with any of the classes of goods referred to in paragraphs (a), (b) and (c) of this sub-rule.
>
> (e) provided that such persons are not eligible to join:-
>
> The Australasian Meat Industry Employees' Union Industrial Union of Workers', Western Australian Branch, Perth.
>
> The Western Australian Bakers', Pastrycooks' and Confectioners' Union of Workers.
>
> The Federated Engine Drivers' and Firemens' Union of Workers of Western Australia, Perth, or any other existing Industrial Union.
>
> (f) who are engaged in packing fruit (other than apples or pears) but only where that work is done in connection with a process designed to preserve the fruit or improve its appearance.
>
> (g) who are engaged in the preparation and packing of edible fungus.
>
> (h) who whether employed in the industry or not are for the time being officers of the union.
>
> (i) The following persons shall not be eligible for membership of the Union:
>
> Persons employed as production employees in the poultry processing industry by Inghams Enterprises Pty Ltd situated, as at 14 September 2000, in Baden Street and Powell Street, Osborne Park or at such other location or locations at which the said enterprise at Osborne Park may subsequently be carried out. In this paragraph, Inghams Enterprises Pty Ltd includes its successors, assignees, transmittees or any purchaser of the whole or any part of its business.
>
> In sub-rule (40) each of the following terms shall have the respective meaning hereby assigned to it -
>
> 'Grocers' Sundries', means and includes cereal and farinaceous foods, tea, coffee and/or chicory essence, coffee chicory, cocoa, honey, jams, selfraising flour, salt, starch, bird seed, matches, sauces, vinegar, pickles, chutneys, rice, sago, tapioca, macaroni, vermicelli, spaghetti, mustard, spices, herbs, condiments, peppers, soups, fish, and fish pastes, Italian paste, flavouring and colouring essences, peel, preserved fruits, dried fruits, health salines, nuts and nut foods and products, edible oils, margarine, eggs, baking powder, custard powder, blanc mange powder, jelly or jelly crystals, gelatine, vegetables, methylated spirits, turpentine, linseed oils, oils, benzine and polishing materials.
>
> 'Polishing Materials' means and includes oils, boot blacking, boot paste, boot polish, harness dressing, harness compounds, ebonite shine, stove polish, metal polish, knife polish, washing blue, moulders' blacking, moulders' plumbago preparations, grinding charcoal or coal dust.

'Chemists Sundries' means and includes tartaric acid, citric acid, alum, bicarbonate of soda, cream of tartar, fruit essences, cordials as manufactured by manufacturing chemists, patent medicines, ointments, hair oils, cosmetics, toilet preparations other than soap, essential oils and health salines.

PROVIDED that no person shall be eligible to be a member of the Union unless they were eligible to be a member of:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers;

or

The Food Preservers' Union of Western Australia, Union of Workers

As at the date of the amalgamation of the two Unions on *[date of amalgamation]*

Applications to Intervene

12 The National Union of Workers (NUW), an organisation registered as a federal body under the provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth) filed an application on 4 November 2016 seeking to object to the amalgamation. Their grounds of objection were:

1. That the application for amalgamation before the Commission has not been authorised in accordance with the rules of the Food Preservers' Union of Western Australia Union of Workers.

   Particulars:

   a. Contrary to rules 12, 16 and 52 of the rules of the Food Preservers' Union of Western Australia Union of Workers, the Food Preservers' Union of Western Australia Union of Workers did not publish a notice in a newspaper that circulates in the Perth District which indicated that there was going to be a General Meeting on 28 July 2016 to vote on the changes to the organisation's rules.

   b. Contrary to rule 18 of the rules of the Food Preservers' Union of Western Australia Union of Workers, the General Meeting held on 28 July 2016 did not achieve a quorum of at least ten members.

13 The NUW in its application contends that it is likely to be affected by the application in the following manner:

> The amalgamation of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Food Preservers' Union of Western Australia Union of Workers will most likely be followed by an application in the Fair Work Commission to merge the Food Preservers' Union of Western Australia Union of Workers' eligibility rule into the eligibility rule of the Australian Workers' Union. If this happens, it will likely result in demarcation disputes between the Australian Workers' Union and the National Union of Workers.

14 At the hearing on 7 November 2016, the NUW, after argument, did not pursue its application to object but did, however, seek to press an application to intervene in the proceedings pursuant to s 27(1)(k) of the IR Act. Only members of the applicants are permitted pursuant to s 55(4) of the IR Act to object to an application made under s 72 of the IR Act to amalgamate two or more registered organisations: ***Re The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA*** (1990) 70 WAIG 3974.

15 Section 27(1)(k) provides:

> 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

16 After hearing from counsel for the NUW and the parties, the Full Bench informed counsel for the NUW and the parties that the NUW's application would be dismissed as it was not satisfied the NUW had a sufficient interest in the matter. The reasons why we made this decision were as follows.

17 The principles for the Commission to consider when determining whether to exercise its discretion to allow a person to intervene in proceedings pursuant to its power to do so under s 27(1)(k) of the IR Act, in particular the determination whether a person has, in the opinion of the Commission, a sufficient interest in a matter that that person should be heard, were considered by Sharkey P in ***Gairns v The Royal Australian Nursing Federation Industrial Union of Workers, Perth*** (1989) 69 WAIG 2343. In ***Gairns*** the substantive application was an application brought before the President's original jurisdiction under s 66 of the IR Act for an interpretation of union rules. The federal nursing union, the Australian Nursing Federation, sought intervention in the proceedings. So, too, did federal and state Academic Unions. President Sharkey found that the most helpful dissertation of principles relating to intervention was set out in ***Re Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division*** [1985] HCA 31; (1985) 155 CLR 513; (1985) 13 IR 86.

18 In ***Ludeke***, the matter before the High Court was an application by the Customs Officers' Association of Australia, Fourth Division to make absolute an order nisi for a prerogative writ to quash an order made by Justice Ludeke that leave be granted to the Administrative and Clerical Officers' Association, Australian Government Employment (ACOA) to intervene in the matter subject to limitation on certain questions it raised in its submissions in a demarcation dispute between that union and the ACOA. Chief Justice Gibbs at (519) - (520), with whom Dawson J agreed, observed:

> The critical question is whether the prosecutor will be denied natural justice if it is allowed to intervene in ACOA's application only to the limited extent allowed by Ludeke J. It may be said immediately that it is clear that notwithstanding the wide discretion in matters of procedure given to the Commission by s. 40(1) of the Act, the Commission is bound to observe the rules of natural justice: *Reg. v. Commonwealth Conciliation and Arbitration Commission*; *Ex parte Angliss Group* ((1969) 122 C.L.R. 546, at p. 552); *Reg. v. Moore; Ex parte Victoria* ((1977) 140 C.L.R. 92, at pp. 101-102); *Reg. v. Isaac; Ex parte State Electricity Commission (Vict.)* ((1978) 140 C.L.R. 615, at p. 620). That means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be

heard before the order is made. That requirement will not necessarily be satisfied if the Commission relies only on the fact that the person concerned has been heard on the same question by the same member of the Commission on a previous occasion. In general, the rules of natural justice are not satisfied unless the opportunity to be heard is afforded in the proceeding in question, although the fact that there had been an earlier hearing would be relevant in determining what constituted a full opportunity to be heard. However, natural justice does not require that everyone who may suffer some detriment as an indirect result of an order of the Commission is entitled to be heard before the order is made. Orders made by the Commission may affect many members of the community who are not parties to the proceedings in question but that does not mean that any member of the community who will be indirectly affected by an order of the Commission has a right to be heard in those proceedings. It has been held that a person who is not a party to a dispute, but who may nevertheless be affected, indirectly and consequentially, by an order made in settlement of the dispute is not entitled to be heard before the matter is determined: *Reg. v. Moore; Ex parte Victoria; Reg. v. Isaac; Ex parte State Electricity Commission (Vict.).*

19 From these observations of Gibbs CJ in ***Ludeke***, the following principles emerge:

(a) Every person whose rights will be directly affected by an order must be given a full and fair opportunity to be heard; and

(b) The principles of natural justice do not require that everyone who may suffer a detriment as an indirect result of an order or who is indirectly affected is entitled to be heard before the order is made.

20 Justice Mason in ***Ludeke*** made similar observations. He observed that an interest which in its nature is inadequate to support intervention in legal proceedings in a court may be sufficient to support intervention in a matter of industrial arbitration before the Commission (523). His Honour found that if an organisation has a substantial interest sufficient to sustain an application to the court for prohibition then, generally speaking, it is desirable that the Commission should recognise that interest, subject to discretionary considerations, as a basis for intervention (525). In making this observation, his Honour had regard to the decision in ***R v Holmes; Ex parte Public Service Association (NSW)*** [1977] HCA 70; (1977) 140 CLR 63 where it was found that where the prosecutor had relevant coverage under its eligibility rule there could be no doubt that it had a substantial interest sufficient to sustain its intervention and that a lack of coverage would result in the prosecutor's interest being much more tenuous (525). Justice Mason in ***Ludeke*** also said (527):

> Indeed, the principal object of intervention is to ensure that all interested parties will participate in a single resolution of a controversy instead of being relegated to a resolution of the controversy in several proceedings. It is the attainment of this object that justifies intrusion into the litigant's right or interest in pursuing his proceedings as he chooses to constitute them.

21 Justice Brennan said that he generally agreed with the judgment of the Chief Justice. His Honour then went on to add that in determining whether a repository of a statutory power is bound to hear a person who is not directly involved in proceedings regard must be had (528):

> to all the circumstances of the case, including the language of the statute, the nature of the power and of the body in which the power is reposed, the nature of the proceedings, the procedural rules that govern the proceedings (especially any provision for intervention by a person not directly involved in them), the interests which are likely to be affected, directly or indirectly, by the exercise of the power and the stage the proceedings have reached when the repository of the power learns of those interests. Generally speaking, a decision that will affect adversely a person's legal rights or his proprietary or financial interests or his reputation ought not to be taken without first giving him an opportunity to be heard provided such an opportunity can be reasonably given *(F.A.I. Insurances Ltd. v. Winneke* ((1982) 151 C.L.R. 342, at pp. 411-412)), even if that person is not directly involved in the proceedings which lead to the making of the decision: cf. *Reg. v. Town and Country Planning Commissioner; Ex parte Scott* ([1970] Tas. S.R. 154, at pp. 182-187; 24 L.G.R.A. 108, at pp. 137-141). But that is not an absolute rule.

22 The NUW argued that it has three interests which, when considered, form a proper basis for the Full Bench to find the NUW has a sufficient interest to be granted leave to intervene in this application. These are:

(a) If the amalgamation application is granted it is likely to result in a demarcation dispute between the NUW and the federally registered body of The Australian Workers' Union (AWU). The NUW points out that all employees who are covered by the FPU are all employed by constitutional corporations, that is national system employers. Whilst it concedes that it has no state registered counterpart body, its concern is that the new amalgamated body will try to expand its coverage of food manufacturing industry employees into the coverage of the NUW. Rule 4(1)(e) of the eligibility for membership rule of the FPU provides that persons engaged in the industries named in the eligibility for membership rule, r 4, are excluded from membership if those persons are eligible to join any other existing industrial union. The NUW argues that the words 'existing industrial union' should be interpreted to apply to both federally registered unions and state unions. It also points out that the FPU is a transitionally registered organisation under the provisions of the *Fair Work (Registered Organisations) Act*. The NUW says that whilst no demarcation issues have arisen at the workplaces of the employees who are covered by the FPU and the NUW, they will arise in the future, as statements have been made that once the amalgamation goes forward the new organisation intends to push aggressively into the food manufacturing industry by the AWU subsequently seeking to change its eligibility rules under the *Fair Work (Registered Organisations) Act*.

(b) The second issue the NUW raises is that, if this application is granted, it will lead to further litigation which raises a financial interest. In particular, if the AWU seeks to incorporate the new eligibility rules created by the amalgamated association into its federal rules the NUW is likely to object and this will incur it costs as it will seek to argue that the provisions of the IR Act were not complied with on grounds that the application to amalgamate was not authorised by the rules of FPU. It also says it may seek judicial review of the decision of the Full Bench.

(c) The third issue the NUW raises is that it claims that its reputation has been disparaged by the FPU at the annual general meeting of the FPU held on 27 May 2016 and at a general meeting held on 28 July 2016. In support of its arguments, the NUW relies upon the following statements set out in:

(i) The FPU minutes of the annual general meeting held on 27 May 2016 which record:

> The President then called for general business. D. Dragocevic queried the choice of the AWU as the amalgamation partner. The Secretary explained that the SDA was not an option due to coverage issues. The NUW is based in Melbourne, does not have a significant presence in WA and may well vacate the state in the near future. The other option, being the AMWU, is facing a membership crisis of its own due to the collapse of the vehicle industry and was itself in amalgamation talks with other Unions.

(ii) The FPU minutes of the general meeting held on 28 July 2016 which record:

> The Secretary advised that, as per the correspondence he had previously sent to all members, the Committee of Management had, after much deliberation, determined that the FPU should consider an amalgamation with the AWU. The Secretary explained that the Committee had considered two other possible amalgamation options, being the AMWU and the NUW. In both cases, there were issues particular to the Western Australian operations of those Unions that suggested to the Committee that the AWU would be a more secure option in the medium to long term.

23 The NUW also put an argument that in construing the power of the Full Bench to permit intervention under s 27(1)(k) of the IR Act, it should have regard to the principal objects of the IR Act, in particular s 6(a), s 6(c) and s 6(e) which provide:

> The principal objects of this Act are —
>
> (a) to promote goodwill in industry and in enterprises within industry; and
>
> …
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality; and
>
> …
>
> (e) to encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations; and

Consideration of application made by the NUW to intervene

24 In our opinion, reliance upon the principal object in s 6(e) of the IR Act does not assist the NUW's argument as this object, insofar as it refers to organisations, only applies to organisations which are registered under the IR Act. This is clear from the definition of the word 'organisation' in s 7 of the IR Act which defines an organisation to mean an organisation registered under div 4 of pt II of the IR Act. As the NUW is not an organisation registered pursuant to the provisions of the IR Act, the Full Bench has no ability to deal with any demarcation dispute that may arise between the NUW and the AWU as they are both federal unions.

25 In any event, the NUW has constitutional coverage in the federal system under the provisions of the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act* of all members and persons who are eligible to be members of the FPU. However, it has no ability to provide any assistance to its members or persons eligible to be members of the FPU under the provisions of the IR Act as it has no state counterpart body or any other state registered organisation that it is affiliated with, or has an administrative arrangement with, in Western Australia. Further, at law, the potential for demarcation could arise, in any event, at any time between the NUW and the FPU.

26 In the event of this application being granted, all that will occur is that the current eligibility for membership of the FPU, as reflected in r 3 and r 4 of the FPU rules, will be incorporated without amendment into the rules of the new amalgamated organisation. Consequently, there will be no change to the status quo other than a new organisation will have coverage of persons who were formerly covered by the rules of the FPU. The only change is that the new amalgamated organisation, in addition to the coverage of the FPU, will be a larger organisation which will have constitutional coverage of employees in other unrelated industries.

27 We are not persuaded by the argument that the proviso in r 4(1)(e) of the rules of the FPU should be construed to apply to unions other than state registered organisations, but even if such a construction is open it would not assist the NUW in its argument. Given that this exemption is contained in the proposed rules of the new amalgamated organisation, even if the exemption can be construed to apply to federally registered organisations such as the NUW, would mean that, if anything, the coverage of these employees could not take effect at a federal level, because of the constitutional coverage of the NUW, as r 4(1)(e) would be construed to exclude from coverage any person who is eligible to be a member of any union irrespective of whether the union is registered as an organisation under the IR Act or the *Fair Work (Registered Organisations) Act*.

28 In any event, the FPU itself is currently registered as a transitionally registered organisation pursuant to the provisions of the *Fair Work (Registered Organisations) Act*. Thus, it has federal coverage of persons who are members of the NUW. In addition, even if the AWU does at some time in the future make an application under the *Fair Work (Registered Organisations) Act* to vary its rules to mirror the coverage of the new amalgamated association by incorporating the current r 3 and r 4 of the rules of the FPU, this is a matter, or to use the words of Mason J in ***Ludeke***, is a controversy, that only the Fair

Work Commission can resolve. It is not a matter that can be taken into account by the Full Bench of this Commission. In any event, no material has been put before the Full Bench by the NUW that such an application is contemplated by the AWU.

29 As to the second issue raised by the NUW that it will seek to run a collateral attack in the Fair Work Commission on the decision of the Full Bench to authorise the registration of a new amalgamated organisation in the event the AWU seeks to incorporate a new rule into its federal rules, is not a matter that is relevant to the determination of this application. Proceedings for an amalgamation under s 72 of the IR Act do not involve the exercise of a discretion, they are administrative proceedings whereby the Full Bench is required to authorise an amalgamation if it is satisfied that the provisions of the IR Act have been complied with which include a consideration of whether the rules of the organisations that seek to amalgamate have been complied with. If the Full Bench is not so satisfied, it is not authorised by the IR Act to grant the application.

30 As to the issue raised in respect of disparagement of the reputation of the NUW, we are not persuaded that this argument or the statements made at the annual general meeting and the general meeting of the FPU raise a sufficient interest as the NUW can make no application to this Commission for constitutional coverage of persons who are members or eligible to be members of the FPU, because it is not registered as an organisation under the IR Act. In these circumstances, it has no right to procedural fairness; that is, it has no right to be heard in these proceedings in relation to the statements made by Mr O'Keeffe at those meetings.

31 Nor did the NUW have a right to attend the meetings of the FPU. If it wished to do so it could have organised its own meetings to discuss with its members the proposed amalgamation. In these circumstances, even if the statements made at the meetings could be regarded as disparagement, the fact that they were made cannot make a difference to the outcome of these proceedings. As the NUW lacks constitutional coverage under the IR Act its interest is too tenuous to be regarded as a sufficient interest.

32 Although the NUW made this application at a late stage, in that it did not make an application to intervene until one business day before the hearing of this application, we did not regard this particular issue as material in our consideration of the merits of the application to intervene as the application was made before the commencement of proceedings and it appears that the matters raised by the NUW did not take any of the parties by surprise.

33 We also note that the provisions of s 72 of the IR Act do not assist the NUW as it is clear that it has no right to object to this application. It is clear from s 55(4) of the IR Act that only members of the amalgamating organisations are able to object. In our opinion, if a person has a valid right to object and notice of their objection complies with the provisions of the IR Act and *Industrial Relations Commission Regulations 2005* (WA), no leave is required for that person to be heard. However, an application to intervene is of a different character. The Commission has a discretion whether to allow intervention.

Application by The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch to be heard

34 At the hearing of the application to amalgamate on 7 November 2016, The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch (AFMEPKIU), whose federal counterpart body is the Australian Manufacturing Workers Union, sought also to appear in these proceedings. After some discussion between it and the parties, the Full Bench was advised that the AFMEPKIU had reached an agreement that the new amalgamated organisation would not seek to extend its coverage of the FPU outside the State of Western Australia.

Notices to object

35 Subsequent to the hearing on 7 November 2016, 15 notices of objection were filed in the Commission. Each of the notices were filed together. At the same time the notices of objection were filed, a letter from solicitors, W G McNally Jones Staff, was also filed in which it was stated that the NUW had instructed it to file 15 notices of objection on behalf of members of the FPU. Each of the notices contained the same grounds of objection. The grounds of objection set out in each one of the notices are as follows:

> 1. I did not know about the General Meeting of the FPU that was held on 28 July 2016. Contrary to rule 52 of the FPU rules. I did not see any advertisement in a newspaper which set out the time, date, location and purpose of the meeting. I was denied an opportunity to vote against the amalgamation.
>
> 2. I do not want my FPU membership cancelled. I especially do not want to become a member of the AWU.
>
> The objector is or is likely to be affected by the application in the following manner, namely:
>
> I am likely to be affected because my membership with the FPU is going to be cancelled by the amalgamation. I am going to be automatically transferred into the newly formed AWU. I do not want my membership at the FPU to end, and I do not want to join the AWU.

36 On the same day, the FPU filed an affidavit of Mr O'Keeffe made on 14 November 2016. In the affidavit Mr O'Keeffe stated he was served with each of the notices of objection at about 11.00 am that morning and at about 11.30 am he compared the names of the objectors to those in the FPU's membership records. In his affidavit he set out the following table which was said to identify the current membership status of the persons who had signed the notices:

Name	Address	Employer	FPU Member No	Membership Status	Date Form 13 signed
Madhieu Akot	36 Eastdene Circle, Nollamara	Vesco Foods	43630	Financial	11 November 2016
Andrijana Ristevski [sic]	11 Monash Circle, Marangaroo	Vesco Foods	873	Financial	9 November 2016

Name	Address	Employer	FPU Member No	Membership Status	Date Form 13 signed
Michael Cox	31 Glenbrook Drive, Ballajura	Baiada Poultry	44175	Financial	11 November 2016
Nadia (Yosufi)	5A Danby Street, Doubleview	Vesco Foods	44089	Financial	9 November 2016
Gabriela Cremanaru	13A Elvire Street, Watermans Bay	Vesco Foods	43819	Financial	13 November 2016
Vladimir Medvedev	9/42 Kathleen Avenue, Maylands	Vesco Foods	43829	Financial	11 November 2016
Seokyoung Heo	188A Knutsford Avenue, Kewdale	Australian Personnel Global	254946	Financial	14 November 2016
James Cotton	15 Copenhagen Street, Baldivis	Australian Personnel Global	245944	Financial	14 November 2016
Row deliberately blank					
Ben Rizzo	6 Fitzroy Place, Heathridge		876	Resigned effective 10 August 2016	11 November 2016
Mark Reyes	49 Brighton Road, Scarborough		43298	Resigned effective 16 December 2013	10 November 2016
Glenn Tupluck [sic]	13 Ravencroft Way, Kelmscott		44382	Resigned effective 10 August 2016	11 November 2016
Stephen Matthews	16 Braithwaite Road, Lockridge		43064	Resigned effective 10 August 2016	11 November 2016
Ian Bryson	82 Teasel Way, Banksia Grove		44201	Resigned effective 10 August 2016	11 November 2016
Jordan Gontran	4 Trentbridge Ave, Madeley			No record of membership	14 November 2016
Vinh Thanh Nguyen	12 Selloa Place, Mirrabooka			No record of membership	9 November 2016

37 Mr O'Keeffe addressed Ms Cremanaru's notice of objection and stated that he had had a conversation with her in which she had informed him that she intended to resign her FPU membership, but as of 14 November 2016 the FPU had not received Ms Cremanaru's resignation.

38 On 15 November 2016, the Full Bench directed the FPU to serve a copy of Mr O'Keeffe's affidavit sworn on 14 November 2016 on each one of the objectors. An inquiry was also made of Mr Fogliani of W G McNally Jones Staff as to whether his firm had any instructions to act for any of the 15 persons who had filed objections.

39 On 16 November 2016, a copy of the following letter was sent on behalf of the Full Bench to each of the persons who had signed notices of objection:

> The application to amalgamate The Australian Workers' Union, West Australian Branch, Industrial Union of Workers with The Food Preservers' Union of Western Australia Union of Workers was held by the Full Bench on 7 November 2016.
>
> Your notice of objection was filed in the registry of the Commission on 14 November 2016.
>
> Prior to the Full Bench delivering its decision as to whether the application should be granted, the members of the Full Bench have determined that you should be provided with an opportunity to be heard in respect of the matters stated in your notice of objection and the affidavit filed in reply to your objection by Peter Francis 'Keefe made on 14 November 2016.
>
> The Full Bench has directed that if you wish to be heard, you should advise these chambers by 4:00 pm next Friday, 25 November 2016.
>
> If you wish to be heard, please advise whether:
>
> (a) you wish to cross-examine Mr O'Keeffe in respect of the contents of his affidavit; and
>
> (b) you wish to make an oral submission or a submission in writing.
>
> If you or any of the other objectors wish to cross-examine Mr O'Keeffe or make an oral submission, the Full Bench will re-list the matter for hearing.

40 On 17 November 2016, Mr Fogliani sent an email to the Commission in which he stated that he had instructions to act directly for Mr Reyes, Ms Ristevska and Mr Rizzo. Mr Fogliani subsequently advised on 17 November 2016 by email that he also had instructions to act on behalf of Mr Tupluk.

41 On 25 November 2016, written submissions were filed by Mr Fogliani on behalf of Ms Ristevska and Mr Rizzo who sought to object to the amalgamation. In an email attached to the submissions, Mr Fogliani informed the Commission that he had been unable to obtain instructions from Mr Reyes because Mr Reyes is out of the country and will not be returning for two months.

42 In the submissions, it was submitted on behalf of Ms Ristevska and Mr Rizzo that a motion to amalgamate with a different organisation is, in practicality, a vote to repeal the current rules of the organisation and to form a new organisation. Consequently, they argued that the strict process which is set out in r 52 of the FPU rules must be complied with.

43 Rule 52 of the rules of the FPU provides:

> No amendment, repeal or alteration of these Rules shall be made unless the amendment, repeal or alteration has been passed and approved by a vote of the majority of the members of the Union present in person at a general meeting called for the purpose in the manner provided by paragraph (a) Section 9 of the Industrial Arbitration Act 1912-1971 as amended.

44 Section 9(a) of the *Industrial Arbitration Act 1912* (WA) (repealed) provided:

> A society shall not make application to be registered as a union unless and until –
>
> (a) a resolution authorising the application has been passed by a majority of the members of the society present in person at a general meeting of the society specially called for the purpose, of which seven days' previous notice specifying the time, place and objects of the meeting has been given, by publishing a copy of a notice thereof in a newspaper circulating generally in the district in which the office of the society is situate and by posting a copy of the notice in a conspicuous place outside that office;

45 In particular, Ms Ristevska and Mr Rizzo sought to put an argument that the amalgamation should not be authorised by the Full Bench as the general meeting called on 28 July 2016, at which a motion was passed by members of the FPU to authorise the proposed amalgamation of the FPU with the AWUWA, was not called in the manner provided by s 9(a) of the *Industrial Arbitration Act 1912*.

46 Pursuant to s 9(a) of the *Industrial Arbitration Act 1912*, Ms Ristevska and Mr Rizzo say prior to calling a general meeting to vote on the amalgamation, the FPU had two options:

(a) it could publish a notice in the local newspaper which set out the time, place and objects of the meeting; or

(b) it could make a written request to the Registrar, in the required form, to use a different method to advertise the meeting.

47 As the FPU did not use either of those methods to advertise the general meeting that occurred on 28 July 2016, pursuant to s 55(4)(a) of the IR Act, it is argued that the Full Bench should refuse to authorise the amalgamation application.

48 No other response to the letter from the Commission dated 16 November 2016 was received from or on behalf of any person who signed a notice of objection.

49 Following service of the submissions filed on behalf of Ms Ristevska and Mr Rizzo, Mr O'Keeffe filed a further affidavit on 25 November 2016. In that affidavit, Mr O'Keeffe stated that:

(a) in his first affidavit he identified Ms Ristevska as a financial member of the FPU and Mr Reyes, Mr Rizzo and Mr Tupluk as former members of the FPU;

(b) because Mr Fogliani stated he was instructed to act for Ms Ristevska, on or about Thursday, 17 November 2016, he made further inquiries into Ms Ristevska's membership status. As a result of that inquiry, he determined he was incorrect in his first affidavit when he identified Ms Ristevska as a financial member of the FPU;

(c) Ms Ristevska resigned her membership of the FPU on Wednesday, 3 August 2016 and therefore was not a financial member when he affirmed and signed his first affidavit; and

(d) the FPU membership records have now been updated to reflect Ms Ristevska's 3 August 2016 resignation and that her membership dues were paid up until the same date.

50 Annexed to Mr O'Keeffe's affidavit made on 25 November 2016 was an email dated 3 August 2016 to the FPU from Ms Ristevska. The email was sent to the payroll manager of her employer, Olly Lemmey, the subject is 'Food Preservers Union deductions, employee # 40302'. In the email Ms Ristevska stated, 'This email is to advised [sic] you to please cease FPU deductions from my wages, effective immediately'.

51 On 30 November 2016, an email was sent to Mr Fogliani on behalf of the Full Bench in which it was stated:

> The Full Bench has directed that if your clients wish to be heard in respect of the matters stated in the further affidavit of Peter Francis O'Keeffe made on 25/11/2016, you should advise these chambers by 4:00 pm on Monday, 5 December 2016.
>
> If any of your clients wish to be heard, please advise whether your clients wish to cross-examine Mr O'Keeffe in respect of the content of his further affidavit; and whether your clients wish to make an oral submission or a submission in writing.

52 Mr Fogliani responded by email dated 5 December 2016 and advised that he wished to cross-examine Mr O'Keeffe on behalf of Ms Ristevska.

53 On 14 December 2016, when cross-examined, Mr O'Keeffe gave the following evidence:

(a) union contributions were received by the FPU from Ms Ristevska's employer for the period ending 31 July 2016;

(b) union contributions are forwarded each month for the whole of a month in arrears by employers on behalf of employees who have union dues deducted from their pay;

(c) the FPU would not become aware that a member has ceased paying union contributions until at least the middle of the month, or towards the end of the month, that follows a month for which union dues have been deducted;

(d) Ms Ristevska's payment for 2016 contributions deducted for July 2016 would not have been forwarded from her employer until the later third of September 2016 and if she had made any contributions in August 2016 they would not have been forwarded to the FPU until the later third of October 2016;

(e) no contributions had been received for Ms Ristevska for any period subsequent to 31 July 2016.

Standing to object

54 Section 55(4)(b), when read with s 72 of the IR Act, creates a right of a member of an organisation to object to the registration of a new organisation created by an amalgamation of one or more organisations.

55 After considering the effect of s 64B and s 64C of the IR Act, the Full Bench found that Ms Ristevska ceased to be a member of the FPU on 31 October 2016.

56 Section 64B provides:

(1) Where —

(a) a period in respect of which a subscription has been paid to an organisation for a person's membership of the organisation expires; and

(b) no subscription to continue or renew that membership has been paid to the organisation before, or within 3 months after, that expiry,

that membership ends by operation of this subsection at the end of that 3 month period.

(2) Subsection (1) does not apply if the membership has already ended under section 64A or under the rules of the organisation.

57 Section 64C provides:

(1) The ways of ending membership of an organisation set out in sections 64A and 64B are in addition to any ways of ending that membership provided for in the rules of the organisation.

(2) The ending of membership of an organisation under section 64A or 64B has effect despite anything in the rules of the organisation.

58 The effect of s 64B(1) is that a person ceases to be a member three months after a 'period in respect of which a subscription has been paid'. The effect of s 64C is that, any means of ending a person's membership that is not prescribed by s 64A (by written resignation) or by s 64B (when subscriptions are not paid) has effect but that s 64B renders any rule of an organisation ineffective that deals with the same subject matter as s 64A and s 64B.

59 As Ms Ristevska had paid subscriptions for membership of the FPU for the period of the whole of July 2016, pursuant to s 64B, her membership ceased on 31 October 2016 as no subscriptions were received by the FPU on behalf of Ms Ristevska within three months of the period ending on 31 July 2016.

60 As the evidence given by Mr O'Keeffe established that Ms Ristevska, Mr Rizzo, Mr Reyes, Mr Tupluk, Mr Matthews, Mr Bryson, Mr Gontran and Mr Nguyen were not members of the FPU at the time each of their notices to object were signed, filed and served, we found that they each did not have standing to object to the application to amalgamate the FPU with the AWUWA and each of their notices of objection would be dismissed.

Whether leave to extend time to object should be granted to the members who signed notices of objection out of time

61 Regulation 68(4) of the *Industrial Relations Commission Regulations* requires that any person who objects to the registration of a new amalgamated organisation must give notice of that objection in the form of Form 13 within 21 days of the publication of the notice of the application to amalgamate. However, the Full Bench is empowered to exempt a person from any procedural requirement of the *Industrial Relations Commission Regulations* (reg 37).

62 Publication of the notice occurred in the Western Australian Industrial Gazette on Wednesday, 28 September 2016: (2016) 96 WAIG 1384. Thus, each of the notices to object were filed out of time as notice of the objections were required to be given by 19 October 2016.

63 The parties opposed leave being granted to the seven members of the FPU who signed notices of objection being granted leave to extend time to object.

64 As Mr Young for the AWUWA pointed out:

(a) despite being afforded an opportunity by the Full Bench to be heard, including a right to make a submission in writing, each member of the FPU who signed a notice of objection has chosen not to make a submission or to appear in the matter;

(b) nor have any of the members who signed a notice to object made an application to extend time; and

(c) even if the Full Bench was to make an order granting an extension of time to all of the seven members, the total number of members who have sought to object is less than 5% of the total number of members of the FPU.

65 Whilst it is notable that Mr Fogliani, on behalf of the NUW, requested that leave be granted to extend time to each of the persons who signed the notices of objection, we formed the opinion that it would not grant an extension of time to any of the seven members who signed notices of objection and determined we would make an order to dismiss the notices of objection for the reasons outlined by Mr Young.

Statutory requirements for amalgamation

66 Pursuant to s 72 of the IR Act, two or more organisations registered under the IR Act may apply for registration of a new organisation. Section 72 of the IR Act provides:

> (1) Where 2 or more organisations (in this section referred to as the amalgamating organisations) apply for the registration of a new organisation and the rules of the proposed new organisation are such that the only persons eligible for membership of the new organisation will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations, the new organisation may be registered by authority of the Full Bench.
>
> (2) An application under this section shall be made under the respective seals of the amalgamating organisations and shall be signed by the secretary and principal executive officer of each of those organisations.
>
> (3) The provisions of this Division applying to and in relation to the registration of organisations under section 53(1) or 54(1), other than section 55(5), shall apply with such modifications as are necessary, to and in relation to the registration of an organisation under this section.
>
> (4) Subsection (1) does not prevent the alteration, pursuant to this Act, at any time after an organisation has been registered under this section, of the rules referred to in that subsection.
>
> (5) On and from the date on which an organisation is registered under this section —
>
> (a) the registration of each of the amalgamating organisations is cancelled; and
>
> (b) all the property, rights, duties, and obligations whatever held by, vested in, or imposed on each of those organisations shall be held by, vested in, or imposed on, as the case may be, the new organisation; and
>
> (c) actions and other proceedings already commenced by or against any of those organisations may be continued by or against the new organisation and the new organisation is substituted for each of those organisations as a party; and
>
> (d) actions and other proceedings that could have been brought by or against any of those organisations may be brought by or against the new organisation.

67 The first requirement of s 72 is that the rules of the proposed new organisation must be such that the only persons eligible for membership of the new organisation must be persons who, if each of the amalgamating organisations had remained in existence, would have been eligible for membership of at least one of the amalgamating organisations (s 72(1)).

68 When regard is had to the rules of the proposed new organisation, it is clear that s 72(1) of the IR Act has been complied with. It is apparent that proposed r 4 of the rules of the proposed new organisation replicates r 4 of the rules of the AWUWA and r 3 and r 4 of the rules of the FPU.

69 The application complies with s 72(2) of the IR Act because the application is signed by the president and the secretary of both the AWUWA and FPU and the common seals of both organisations are affixed to the application.

70 Turning to s 72(3) of the IR Act, s 53 relates to the qualifications for and the basis of registration of organisations of employees. Section 53(1) of the IR Act provides that an organisation consisting of not less than 200 employees associated for the purpose of protecting or furthering the interests of employees may be registered by authority of the Full Bench. It is clear that the new amalgamated organisation will have more than 200 members who are employees. It is also clear from proposed r 3 that the new organisation is to be formed for the purpose of protecting or furthering the interests of employees.

71 Other than s 55(5) of the IR Act, s 55 applies to applications to amalgamate. Section 55(1), s 55(2), s 55(3) and s 55(4) of the IR Act provide:

> (1) An organisation seeking registration under section 53 or 54 shall lodge in the office of the Registrar —
>
> (a) a list of the officers of the organisation with their addresses; and
>
> (b) 3 copies of the rules of the organisation; and
>
> (c) the prescribed form of application.
>
> (2) When the organisation has complied with the requirements of subsection (1) the Registrar shall publish in the required manner —
>
> (a) a notice of the application; and
>
> (b) a copy of such rules of the organisation as relate to the qualification of persons for membership of the organisation and, without limiting the generality thereof, including any rule by which the area of the State within which the organisation operates, or intends to operate, is limited; and
>
> (c) notice that any person who objects to the registration of the organisation and who, having given notice of that objection within the time and in the manner prescribed, satisfies the Full Bench that he has a sufficient interest in the matter, may appear and be heard in objection to the application.
>
> (3) An application under this section shall not be listed for hearing before the Full Bench until after the expiration of 30 days from the day on which the matters referred to in subsection (2) are first published.

(4) Notwithstanding that an organisation complies with section 53(1) or 54(1) or that the Full Bench is satisfied for the purposes of section 53(2) or 54(2), the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that —

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

72 In compliance with s 55(1) of the IR Act, the AWUWA and the FPU made application in the prescribed form and have filed a list of officers of the new organisation with their addresses and three copies of the rules.

73 Pursuant to s 55(2) of the IR Act, the Registrar published in the Western Australian Industrial Gazette the notice of the application and a copy of the rules of the proposed new organisation as they relate to the qualification of persons for membership and notice that any person who wishes to object to the registration of the organisation and who satisfies the Full Bench that he or she has sufficient interest in the matter, may appear and be heard in objection to the application. The notice was published in the gazette on 28 September 2016 ([2016] WAIRC 00761; (2016) 96 WAIG 1384).

74 The application was listed for hearing on 7 November 2016, which was the date notified in the gazette. Consequently, as required by s 55(3) of the IR Act, the hearing was held after the expiration of 30 days from the date on which the notice was published.

75 Pursuant to s 55(4)(a) of the IR Act, the application is required to be authorised in accordance with the rules of both organisations.

Evidence of compliance with the rules of the FPU

76 The principles for the approach to the construction of the rules of an organisation are well established. In ***Stacey v Civil Service Association of Western Australia (Inc)*** [2007] WAIRC 00568; (2007) 87 WAIG 1229, Ritter AP said [90] - [93]:

> Brinsden J with whom Smith J agreed in *Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health* (1981) 61 WAIG 616 at 618 said:-
>
> > 'Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any other document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule. This approach has been endorsed in relation to awards: see *Geo A. Bond & Co. Ltd. (In Liq.) v McKenzie* (1929) A.R. 499 at 503-4 referred to in *Federal Industrial Law* by Mills and Sorrell 5th Ed. at p522. I also said much the same thing in the unreported decision of *Bradley v The Homes of Peace* 1005/1978, judgment delivered 21st December, 1978 at p.13-14.'
>
> These observations have been cited and applied in s66 applications. An example is *Williams v SDAEAWA* (2005) 85 WAIG 1963.
>
> A similar approach has been adopted by the High Court in the construction of union eligibility rules. In *Re Anti-Cancer Council of Victoria; Ex Parte State Public Services Federation* (1992) 175 CLR 442 at 448, Mason CJ, Brennan and Gaudron JJ said it 'is well settled that union eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning'. Their Honours cited a number of decisions in support of this proposition including *The Queen v Isaac; Ex Parte Transport Workers' Union* (1985) 159 CLR 323 decision, where Wilson J at 340 said:-

> 'In construing the eligibility clause in the constitution of an organization, it is necessary to bear in mind the nature of the instrument in which the words appear and the purposes that it is intended to serve. The rule now in question bears ample indication on its face that it has been prepared without the assistance of a skilled draftsman. It has been amended from time to time, probably in response to the exigencies attending the industrial affairs of the union and without regard to the effect of the amendment on the internal consistency of the clause as a whole. It follows that the words of the rule should be given a wide meaning and interpreted according to their ordinary or popular denotation rather than by reference to some narrow or formal construction: *Reg. v Cohen; Ex parte Motor Accidents Insurance Board*; *Reg. v McKenzie; Ex parte Actors and Announcers Equity*. Nevertheless, notwithstanding this generosity of approach, the meaning of the words remains a legal question to be determined by the application of the ordinary rules which govern the construction of written documents: *Reg. v Aird; Ex parte Australian Workers' Union; McKenzie*.' (Footnotes omitted)

French J in *Re Election for Office in Transport Workers' Union of Australia, Western Australian Branch* (1992) 40 IR 245 at 253 said that the 'preferred approach to the construction of union rules which requires them to be construed not technically or narrowly but broadly and liberally and not "subjected to the same meticulous scrutiny as a deed carefully prepared by lawyers."'. His Honour cited *R v Holmes; Ex Parte Public Service Association* (NSW) (1977) 140 CLR 63 per Gibbs J at 73 and *Re An Election in the Australian Collieries Staff Association (NSW Branch)* (1990) 26 FCR 499 per Lockhart J at 502. The reasons of French J were cited with approval by Mansfield J in *Thomas v Hanson* [2001] FCA 539 at [20]. Authorities cited by the applicant set out a similar method of approach. (*Delron Cleaning Pty Ltd T/A Delron Hospitality Management* (2004) 84 WAIG 2527 at [40] and *FMWU v GW Smith and KJ Rose* (1988) 68 WAIG 1010.

77 The FPU does not have a rule relating to the amalgamation with another organisation. Although Mr O'Keeffe in his statutory declaration made on 7 September 2016 states that the actions were taken by the FPU to effect the proposed amalgamation in accordance with r 52, that does not appear to be the case. In any event, the failure to follow the procedure for the convening of a general meeting pursuant to r 52 is, in our view, not material. Whilst the FPU sought authorisation from its committee of management at a meeting on 27 May 2016 and its members at a general meeting held on 28 July 2016, the FPU was not required by its rules to follow the procedure in r 52.

78 Pursuant to s 72(3) of the IR Act, the provisions of pt II div 4 apply to and in relation to the registration of employee organisations under s 53(1) and these provisions apply, other than s 55(5), with such modifications as are necessary to the registration of an amalgamated organisation. Before approving an application for amalgamation the members of the Full Bench must be satisfied that the conditions for registration set out in s 55(4) of the IR Act have been complied with.

79 An application for amalgamation of two organisations pursuant to s 72 of the IR Act is to create a new organisation with its own rules and is not an amendment, repeal or alteration of rules of an organisation seeking to amalgamate with another or other organisations. An amendment, repeal or alteration of rules contemplates a change of the rules of an organisation that continues to exist. However, on and from the registration of the new organisation the registration of each amalgamating organisation is cancelled pursuant to s 72(5) of the IR Act. It follows therefore, on cancellation, the rules of each amalgamating organisation cease to exist by operation of law.

80 The absence of a specific rule in the rules of the FPU authorising an amalgamation does not have the effect that the FPU is prohibited from making an application with another organisation or more than one organisation to amalgamate to create a new organisation. It is empowered to seek amalgamation with the AWUWA by operation of s 72 of the IR Act.

81 Section 55(4)(b) requires an amalgamating organisation to take reasonable steps to adequately inform members of the intention to apply for registration of the new organisation, the proposed rules of the new organisation and a right to object to the making of the application to amalgamate or to object to the rules of the new organisation. Further, s 55(4)(b) requires that members must be given a reasonable opportunity to make such an objection.

82 As set out in these reasons, we are satisfied that the FPU complied with s 55(4)(b) by taking a number of steps including holding a general meeting in compliance with the requirements of r 16 for the holding of general meetings (other than general meetings convened pursuant to r 52).

83 Rule 16 of the FPU provides for the procedure of notification of general meetings. Rule 16 provides:

> Subject as provided in Rule 52 members of the Union shall be notified of General Meetings, Factory Meetings and Section Meetings by notices placed on the Union notice board at places of members' employment, and by such other similar means as the Committee of Management may deem reasonable. The time, place and purpose of the meeting shall be clearly indicated in the notice. Seven days notice at least of the holding of such meetings shall be given.

84 Pursuant to r 18, a quorum for all meetings of the union (except committee of management meetings) is 10 members.

85 In the statutory declaration made on 7 September 2016, Mr O'Keeffe set out the facts and circumstances the FPU relies upon in making this application to amalgamate the FPU with the AWUWA. Because of the matters raised in the NUW's notice of objection and an attached statutory declaration made by an organiser employed by the NUW, Mr Tim Gunstone of 833 Bourke Street, Docklands, Victoria, about what he says occurred at the general meeting of the FPU on 28 July 2016, Mr O'Keeffe gave oral evidence on oath about what occurred at that meeting to supplement the evidence which was set out in his statutory declaration.

86 Mr O'Keeffe's written and oral evidence is as follows.

87 On 19 May 2016, to effect the proposed amalgamation in accordance with the FPU rules as varied by the order made in PRES 1 of 2016 on 21 March 2016, Mr O'Keeffe caused a notice of an annual general meeting to be displayed in places of members in employment as required by r 16 of the FPU rules. The notice stated that in accordance with an order handed down by Smith AP on 21 March 2016, an annual general meeting of the FPU would be held on 27 May 2016 at 5.30 pm at the Osborne Park Community Centre, 11 Royal Street, Osborne Park (annexure 3, statutory declaration of Mr O'Keeffe). When

giving oral evidence, Mr O'Keeffe explained that he handed the notices to the FPU organiser, Mr Ali, and instructed him to display them at every worksite.

88 On 27 May 2016, the annual general meeting was held at the Osborne Park Community Centre. The minutes of the meeting record that there were 12 members who attended, including Mr O'Keeffe. Consequently, it is clear that a quorum was present at the meeting in accordance with r 18 of the rules of the FPU. The FPU minutes of the meeting record:

> Chair: B Ahmed
>
> Present: As per attached Attendance List
>
> Meeting opened at 5.30pm
>
> Apologies: None
>
> The Secretary advised that he had been unable to locate the minutes of the previous AGM.
>
> The Secretary presented a report on 125 new members who had joined the Union since November 2014. Moved P. O'Keeffe seconded B. Ahmed that these members be admitted to the FPU
>
> CARRIED
>
> The Secretary presented his report on the state of the FPU. He advised the meeting that, due to the precarious financial position in which the Unions finds itself, the Committee of Management had resolved to seek amalgamation with the AWU. This would ensure that members retained the protection of an appropriately resourced Union. The next step in the process would be to call a General Meeting of members to decide the issue. Moved A. Alsudani seconded B. Ahmed that the Secretary's report be received and adopted.
>
> CARRIED
>
> The President waived his opportunity to present a report.
>
> The Secretary presented the financials as per the attached report. Moved B. Ahmed seconded A. Alsudani that the financial report be received and adopted.
>
> CARRIED
>
> The Secretary moved that KPMG be appointed as the Union's auditors for the forthcoming year. Seconded B. Ahmed.
>
> CARRIED
>
> The Secretary advised of the content of the attached Returning Officer's Report. Moved P.O'Keeffe seconded D. Dragocevic that the Returning Officer's Report be received and adopted.
>
> CARRIED
>
> The President then called for general business. D. Dragocevic queried the choice of the AWU as the amalgamation partner. The Secretary explained that the SDA was not an option due to coverage issues. The NUW is based in Melbourne, does not have a significant presence in WA and may well vacate the state in the near future. The other option, being the AMWU, is facing a membership crisis of its own due to the collapse of the vehicle industry and was itself in amalgamation talks with other Unions.
>
> There being no further general business the President declared the meeting closed at 6.04pm.

89 Immediately following the annual general meeting, the committee of management of the FPU held a meeting. At that meeting the committee of management resolved to direct Mr O'Keeffe to call a general meeting of the FPU's membership to consider the proposed amalgamation.

90 On 17 June 2016, Mr O'Keeffe caused a notice of a general meeting to be prepared for a general meeting to be held on 3 July 2016 at the Osborne Park Community Centre to consider the amalgamation with the AWUWA (annexure 4, statutory declaration of Mr O'Keeffe). He handed copies of the notices to Mr Ali and instructed Mr Ali to put them up on all the notice boards at all of the FPU worksites. On the same day, Mr O'Keeffe caused a letter and annexures to be posted to all FPU members. In the letter Mr O'Keeffe outlined concerns about the viability of the FPU and attached a letter dated 7 April 2016 that he had written to the FPU's auditor about, among other things, the financial state of the FPU. He also attached a copy of the notice of general meeting that was proposed to be held on 3 July 2016 and stated that the reason for the general meeting was to consider the proposed amalgamation with the AWUWA (annexure 5, statutory declaration of Mr O'Keeffe).

91 On 3 July 2016, the general meeting was unable to be held because insufficient members attended the meeting to constitute a quorum.

92 On 18 July 2016, Mr O'Keeffe caused a further notice of a general meeting to be displayed in worksites of members. The notice advertised a general meeting was to be held on 28 July 2016 at Baiada Steggles, 116 Howe Street, Osborne Park (annexure 6, statutory declaration of Mr O'Keeffe). Again, Mr O'Keeffe handed those notices to Mr Ali to display at each of the premises where employees of the FPU work. He also asked Mr Ali to circulate amongst the members and express to them that this was an important meeting to attend. The reason why Mr O'Keeffe decided to hold the general meeting at the premises of Baiada Steggles is that Baiada Steggles is where the majority of members of the FPU work. Mr O'Keeffe explained that approximately 200 members of the FPU are either employed by Baiada Steggles directly or work for contractors at the Baiada Steggles site.

93 In Mr Gunstone's statutory declaration, he made the following statements about events that were said to have occurred at a meeting of FPU members on 28 July 2016:

(a) On 28 July 2016 at 2.10 pm, he attended the Baiada Steggles Osborne site. Upon entering the site, he initially spoke with five members of the FPU in and around the lunchroom and kill area and ascertained that none of those members were aware of a general meeting to be conducted by the FPU at 2.30 pm that day.

(b) There were no signs in the lunch area notifying FPU members of such a meeting.

(c) At 2.30 pm, Mr Gunstone entered a small meeting room in the administration area of the site where seven people were present, Mr O'Keeffe, Mr Michael Zoetbrood, Mr Ali and four people whose names he did not know that he believed to be FPU members employed at Baiada Steggles.

(d) Mr O'Keeffe asked him to leave, but Mr Gunstone stated that he would remain until such time as he had an opportunity to speak about the proposed amalgamation and answered any queries the employees present might have.

(e) Mr O'Keeffe stated that the meeting had not started yet, as there was no quorum.

(f) Mr Gunstone spoke to the employees in the room about the amalgamation and general poultry issues.

(g) Mr Gunstone left the room at 2.40 pm, at which point the meeting had still not commenced as there was not a quorum.

(h) Mr Gunstone returned to his car and at 2.50 pm drove past the Baiada Steggles administration area and noticed that Mr Zoetbrood's AWU branded car was no longer present.

94 In response to these statements raised in the statutory declaration of Mr Gunstone, Mr O'Keeffe gave the following evidence.

(a) Although Mr Ali had informed him that three notices of the general meeting had been placed at the Baiada Steggles premises, he did not go into any of the areas where the notices had been placed by Mr Ali as he went straight to the boardroom of Baiada Steggles where the general meeting was to be held.

(b) Mr Gunstone came into the boardroom a minute or two before 2.30 pm with another organiser of the NUW, whose name is Katrina. At that point in time the general meeting had not commenced.

(c) Mr Gunstone's statutory declaration only sets out a partial description of what occurred in the boardroom. Mr Gunstone came into the boardroom, introduced himself and stated he would be staying for the meeting. Mr O'Keeffe asked Mr Gunstone if he was a member of the FPU, knowing full well he was not. Mr O'Keeffe told Mr Gunstone it was an FPU meeting to discuss the amalgamation and as a non-member he was not welcome to attend. Mr Gunstone said in reply that site management had told him that he had the right to attend the meeting. Mr Gunstone then said to the employees present in the boardroom that, 'With this amalgamation going on FPU members would have to think that the officials of this union are either incompetent or corrupt, or both'. Mr O'Keeffe intervened at that point and told Mr Gunstone it was not appropriate to carry on in that fashion and to leave the meeting.

(e) Mr Gunstone refused to leave the boardroom. Consequently, Mr O'Keeffe left the boardroom and spoke to the site manager of Baiada Steggles who informed Mr O'Keeffe that Mr Gunstone had told him he had been invited to attend the FPU meeting.

(f) Mr O'Keeffe then walked with the site manager to the boardroom with the intention of taking steps to remove Mr Gunstone from the boardroom.

(g) As Mr O'Keeffe walked back to the boardroom, Mr Gunstone emerged from the boardroom and said he was leaving.

(h) Mr Gunstone left the boardroom a minute or two before 2.40 pm.

(i) Mr O'Keeffe then returned to the boardroom and was informed by the members who were present at that time that they had told Mr Gunstone to leave. At that point in time, there was no quorum as there were only six members of the FPU present.

(j) After Mr Gunstone left, Mr O'Keeffe spoke to Mr Ali and asked him to speak to some delegates to invite some more members of the FPU to attend the general meeting. Mr Ali did so and a number of members subsequently came into the boardroom.

(k) Mr Zoetbrood remained in the boardroom. Once the meeting commenced Mr Zoetbrood spoke to the members about the amalgamation. Mr Zoetbrood stepped outside the boardroom whilst the members voted. Mr Zoetbrood left the premises of Baiada Steggles with Mr O'Keeffe just after 3.00 pm.

(l) Mr Zoetbrood's car did not have AWU branding, it was a plain white Holden Captiva.

95 Mr O'Keeffe also gave evidence that once a quorum was present, the general meeting commenced. The members who were present at the general meeting signed an attendance record which is attached to the minutes of the general meeting of the FPU held on 28 July 2016. The attendance record records that, together with Mr O'Keeffe, there were 13 members of the FPU present. Of the members present at the general meeting who are employees, one member who attended is employed at another site owned by Vesco Foods. When Mr O'Keeffe returned to the union office he checked the names of the members who attended the meeting against the membership records of the FPU and ascertained that with the exception of one person all were financial members of the FPU.

96 The FPU minutes of the 28 July 2016 general meeting record:

> Chair: In the absence of the President and Vice Presidents, Committee of Management member D. Dragosevic was invited to chair the meeting.
>
> Present: As per attached Attendance Sheet
>
> AWU WA Secretary Mike Zoetbrood was invited to attend to provide a report from the AWU.
>
> Meeting opened at 2.35pm
>
> Apologies: B. Ahmed, I. Taha, F. Enua
>
> The Chairman invited the Secretary to outline the potential amalgamation of the FPU with the AWU.
>
> The Secretary advised that, as per the correspondence he had previously sent to all members, the Committee of Management had, after much deliberation, determined that the FPU should consider an amalgamation with the AWU. The Secretary explained that the Committee had considered two other possible amalgamation options, being the AMWU and the NUW. In both cases, there were issues particular to the Western Australian operations of those Unions that suggested to the Committee that the AWU would be a more secure option in the medium to long term.
>
> The Secretary explained the financial position of the FPU, as outlined in his previous correspondence. This position was such that the FPU had no viable practical options other than amalgamation. The Secretary explained the likely outcome of the FPU continuing to operation without an amalgamation, being a situation of insolvency.
>
> The Chairman then invited AWU Secretary M. Zoetbrood to speak to the meeting. Mr Zoetbrood outlined the fee structure offered by the AWU, being no change to fees until July 2017 and then payment of the concessional fee, currently at $8 per week. He also fielded questions regarding the AWUs coverage and size.
>
> Mr Zoetbrood then withdrew to allow FPU members to consider the amalgamation and ask questions of the Secretary.
>
> Following general discussion about the timing of the amalgamation, it was moved P.O'Keeffe and seconded A. Alsudani that the FPU amalgamate with the AWU and the Secretary of the FPU being authorised to do all things necessary to give effect to such a decision.
>
> CARRIED UNANIMOUSLY
>
> There being no further general business the Chairman declared the meeting closed at 3.10pm.

97 The motion passed at the general meeting was (annexure 7, statutory declaration of Mr O'Keeffe):

> That the Food Preservers' Union of Western Australia, Union of Workers (FPU) amalgamate with the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Secretary of the FPU be authorised to do all things necessary to effect that amalgamation.
>
> Moved: P.O'Keeffe
>
> Seconded: A. Alsudani
>
> RESOLVED:
>
> MOTION CARRIED UNANIMOUSLY

98 When Mr O'Keeffe gave oral evidence, he was asked to explain the statements that he made to the annual general meeting about the NUW, in particular what did it mean that the NUW did not have a significant presence in Western Australia. Mr O'Keeffe said that he explained to the members at the annual general meeting that the NUW has one full-time and one part-time official to service its members. He also explained to the members that due to the operating practice of the FPU (which is to pay a fee for administrative services to the SDAWA), the FPU members have access to one legal officer, three industrial officers, a training officer, a workers' compensation officer, an occupational health safety officer and other organisers who, apart from Mr Ali, can be accessed if Mr Ali is not available. Mr O'Keeffe also said when giving oral evidence that he explained to the members at the annual general meeting that the AWUWA has significantly more resources available in Western Australia than the NUW, including legal officers, organisers and other officers all based in Western Australia. He also told the members at the annual general meeting that the NUW was potentially or possibly vacating its Western Australian operations sometime in the future, but he did not further elaborate on this statement.

99 Subsequent to the general meeting of the FPU on 28 July 2016, four meetings were held in about the first week of August 2016 at Baiada Steggles to discuss the proposed amalgamation. Approximately 150 members of the FPU collectively attended these meetings. The four meetings were all held on the same day. There were two meetings held during the morning shift and two during the afternoon shift. Each one of those meetings were held in paid time. Mr Zoetbrood from the AWUWA also attended each of those meetings and spoke to the members about the effect of the amalgamation.

100 On 15 August 2016, Mr O'Keeffe caused a letter to be posted to all FPU members which gave members notice of the proposed amalgamation, access to a copy of the proposed rules of the amalgamated organisation and informed members of their right to object to the amalgamation by writing to the Registrar within 21 days of the date of issue of the notice (annexure 8, statutory declaration of Mr O'Keeffe). On the same day, Mr O'Keeffe also caused a copy of the notice to be displayed on the glass door to the reception of the FPU's registered address at Level 5, 25 Barrack Street, Perth.

101 Mr Ali gave evidence that he is employed as an organiser by the FPU and his role is to visit all FPU sites. Mr Ali informed the Full Bench that it is his usual practice to visit the Baiada Steggles worksite twice a week. His evidence is that:

(a) On 19 May 2016, he was given notices of the annual general meeting on 27 May 2016 by Mr O'Keeffe to display at each of the worksites and he placed notices in the entrance of or inside the lunchrooms at each of the worksites.

(b) On 17 June 2016, he placed a notice advising members of a general meeting on 3 July 2016, at all worksites where FPU members work.

(c) On 18 July 2016, he placed notices of the general meeting to be held on 28 July 2016 at all worksites. At the Baiada Steggles worksite he put up three notices, one in the main entrance of the lunchroom, one in the kill lunchroom and one in the deboning lunchroom.

(d) The notices he placed on the notice boards at Baiada Steggles on 18 July 2016 were still on the notice boards up to three days after the general meeting on 28 July 2016 as he saw them when he visited the premises.

102 When regard is had to the evidence of Mr O'Keeffe in his statutory declaration made on 7 September 2016 and his oral evidence, together with the oral evidence of Mr Ali, we are satisfied that the application for amalgamation has been authorised in accordance with the provisions of the IR Act.

103 We are satisfied that r 16, when read with s 55(4)(b) of the IR Act, has been complied with as reasonable steps were taken to adequately inform members of the proposal for the amalgamation and provide them with a reasonable opportunity to object as:

(a) The time, place and purpose of a general meeting to be held on 28 July 2016 was clearly indicated in a notice placed on the union notice board at places of members' employment on 18 July 2016 which was more than seven days prior to the date of the general meeting.

(b) A letter setting out the proposal to amalgamate the FPU with the AWUWA and reasons therefor was posted to all FPU members on 17 June 2016.

(c) At the general meeting on 28 July 2016, a motion was passed by a majority of the members present approving the amalgamation of the FPU with the AWUWA.

(d) As required by r 18, more than 10 members were present at the general meeting on 28 July 2016, thus a quorum was constituted when the resolution to amalgamate was passed.

104 We are also satisfied that less than 5% of members of the FPU have objected to the making of the application to amalgamate. Even if the Full Bench had not dismissed the notices to object, when regard is had to the evidence of the membership status of each of the persons for whom notices of objection were filed, it is clear that only 12 of those persons were members of the FPU when the decision was made by the members at the general meeting on 28 July 2016 to approve the amalgamation and at the time the notices were filed and served only seven were members. As the FPU had 268 members as at 12 October 2016, 5% of the members of the FPU was 13 (rounded down).

Evidence of compliance with the rules of the AWUWA

105 The procedure for amalgamation is prescribed in r 50 of the rules of the AWUWA. Rule 50 of the rules provides:

(1) The Union may amalgamate with any other employee organisation provided:

(a) That the provisions of this rule have been adhered to; and

(b) The other amalgamating organisation has approved the proposed amalgamation in accordance with its rules.

(c) The amalgamated Organisation will retain the name The Australian Workers' Union, West Australian Branch, Industrial Union of Workers.

(2) Where the Union and another organisation propose to amalgamate, the provisions of this rule shall apply in lieu of Rule 36 – Alteration of Rules.

(3) Any proposed amalgamation requires approval by a majority vote of the Executive.

(4) An application for amalgamation shall not be made to the Registrar of WAIRC unless a notice of the proposed amalgamation is published in The Australian Worker which shall be distributed to all financial members.

(5) The notice referred to in subrule (4) shall inform members of the proposal and the reasons for the proposal and that:

(a) The Union intends to apply to the Registrar of WAIRC for registration of the amalgamated organisation after the expiration of 21 days from the date of issue of the issue of The Australian Worker; and

(b) The member may object to the proposed amalgamation by forwarding a written objection to the Registrar of WAIRC to reach him no later than 21 days from the date of the issue of The Australian Worker.

(6) A person holding an office in the Union or in the other amalgamating organisation may upon the coming into force of the amalgamation hold an office in the proposed amalgamated organisation. Provided that no person is to hold an office in the amalgamated organisation for more than four (4) years after the amalgamation takes effect without an election being held in relation to that office.

106 Pursuant to r 50(3), any proposed amalgamation requires approval by a majority vote of the executive. In a statutory declaration made by Mr Zoetbrood on 7 September 2016, he states that on 10 June 2016 a meeting of the AWUWA executive was held in Perth and the proposed amalgamation was approved unanimously in accordance with the requirements of r 50(4) [sic].

107 The minutes of the meeting of the AWUWA held on 10 June 2016 record that nine members of the executive attended the meeting and the following motion was carried unanimously:

> The Executive approves the proposed amalgamation between the Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWU) and The Food Preservers' Union of Western Australia Union of Workers (FPU). The

Executive further authorises the Secretary to take all necessary steps and applications to WAIRC in connection with the proposed amalgamation.

Moved: C. King

Seconded: B. Gandy

RESOLVED:

MOTION CARRIED UNANIMOUSLY

108 Pursuant to r 22 of the rules of the AWUWA, at meetings of the executive 50% of the members of the executive shall form a quorum. Pursuant to r 24 of the rules, there are 14 officers of the executive. Consequently, it is clear that a quorum was present at the meeting of the executive held on 10 June 2016.

109 Prior to the AWUWA taking steps to implement the proposed amalgamation in accordance with its rules, it too brought an application under s 66 of the IR Act seeking waiver of the requirements in r 36 and r 50 of the rules of the AWUWA which require notices to be published in 'The Australian Worker' magazine to inform members of a proposed rule change or amalgamation. The grounds on which the application was made was that the union had recently ceased to publish 'The Australian Worker'. Thus, it was unable to comply with the requirements of r 50 in the absence of orders being made by the President under s 66 of the IR Act (PRES 2 of 2016). After hearing the parties, the following order was made on 20 June 2016 in PRES 2 of 2016 ([2016] WAIRC 00366; (2016) 96 WAIG 667):

> WHEREAS this matter having come on for a hearing before me on 17 June 2016, and having heard Mr M Zoetbrood in person and Ms E Douglas (of counsel) and Mr B Gandy on behalf of the respondent;
>
> AND WHEREAS having heard that The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (the AWU) intends with The Food Preservers' Union of Western Australia Union of Workers (the Food Preservers' Union) to make an application to amalgamate pursuant to s 72 of the *Industrial Relations Act 1979* (WA) (the Act) after each organisation has complied with its respective registered rules for doing so;
>
> AND WHEREAS r 50 – Amalgamation, of the rules of the AWU, requires a notice to be published in The Australian Worker magazine to inform members of a proposed amalgamation;
>
> AND WHEREAS the parties by consent seek the observance of r 50(4) and r 50(5) be waived and undertake to take reasonable steps to adequately inform financial members of the proposed amalgamation consistent with s 55(4) of the Act;
>
> NOW THEREFORE pursuant to the powers conferred by s 66(2) of the Act, hereby orders that —
>
> 1. Compliance with r 50(4) and r 50(5) of the rules of the respondent (the rules of the AWU) is waived.
> 2. Rule 50 of the rules of the AWU is varied as follows:
>
> (a) An application for amalgamation with the Food Preservers' Union shall not be made to the Registrar of the Western Australian Industrial Relations Commission unless notice of the proposed amalgamation is published by:
>
> (i) Emailing all financial members for whom the AWU has a valid email address.
>
> (ii) Mailing a copy of the notice to all delegates of the AWU with a request for the notice to be placed on the noticeboard at their workplace.
>
> (iii) Posting of the notice on the AWU website.
>
> (iv) The AWU will place a notice in the public notices section of The West Australian newspaper.
>
> (v) Displaying the notice in a prominent place on the doors of the AWU's Perth, Bunbury and Kalgoorlie offices.
>
> (b) The notice referred to in order 2(a) of this order shall inform members of the proposal and the reasons for the proposal and that:
>
> (i) The AWU intends to apply to the Registrar of the Western Australian Industrial Relations Commission for registration of the amalgamated organisation after the expiration of not less than 28 days from the publication of the notice in The West Australian newspaper.
>
> (ii) The member may object to the proposed amalgamation by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach her no later than 21 days from the publication of the notice in The West Australian newspaper.
>
> (c) Publication of the notice referred to in order 2(a) of this order is to be given within seven days of a General Meeting of the Food Preservers' Union approving the proposed amalgamation.
>
> 3. The application for amalgamation referred to in order 2(a) of this order shall not be made until at least 28 days from the publication of the notice in The West Australian newspaper.
> 4. Unless this order is revoked or varied, the order shall cease to have effect on 31 October 2016.
> 5. There be liberty to the parties to apply to vary the terms of this order.

110 At the conclusion of the general meeting of the FPU on 28 July 2016, Mr Zoetbrood was advised that the proposal had been endorsed unanimously by the FPU general meeting.

111 As required by order 2 of the order made in PRES 2 of 2016 on 20 June 2016, on 1 and 2 August 2016:

(a) the AWUWA undertook steps to publish the notice of proposed amalgamation setting out the proposal and the reasons of proposal. The notice stated as follows (AWU2, statutory declaration of Mr Zoetbrood made on 7 September 2016):

AWU NOTICE

RE: Proposed AWU - FPU Amalgamation

Dear AWU Delegates and Members

I write to advise you of the proposed amalgamation between The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWU) and The Food Preservers' Union of Western Australia Union of Workers (FPU).

The FPU is a small State registered Union of about 270 members. The proposed amalgamation was approved by a General Meeting of FPU members on 28th July 2016 and the AWU Executive on 10th June 2016. Please note there will be no change to the AWU structure, fees, organisers and officials or the name of the Union.

An AWU member who objects to this proposed amalgamation may do so in writing to the Registrar of the WA Industrial Relations Commission (WAIRC) within 21 days of the date of this notice.

The amalgamated union's rules will be based on the current AWU registered rules with the addition of the FPU eligibility rules and minor procedural amendments to rules 36 and 50. A copy may be viewed on the AWU website https://wa.awu.net.au/news or a hardcopy can be obtained by calling the AWU Perth Office on (08) 9221 1686.

(b) emailed the notice to 2,126 members for whom the AWUWA has a valid email address;

(c) mailed two copies of the notice to 263 delegates along with a request to place the second copy on the notice board in their workplace;

(d) posted the notice, including a link to the proposed rules, on the AWU website;

(e) placed a notice in the public notices of The West Australian newspaper which was published on 1 August 2016; and

(f) displayed the notice in a prominent place on the doors of the AWUWA Perth, Kalgoorlie and Bunbury offices.

112 On 16 August 2016, the AWUWA mailed a letter to all FPU members. The letter stated as follows (AW6, statutory declaration of Mr Zoetbrood):

Your Union, the Food Preservers Union (FPU) has after much careful consideration of the best future options for Union members, decided to amalgamate with The Australian Workers' Union (AWU).

A General meeting of FPU members held on 28th July 2016 unanimously approved the decision to amalgamate. If the WA Industrial Relations Commission approves the amalgamation application you will automatically become a member of the AWU and are entitled to all the benefits that the AWU offers. Attached is a summary of the various services and benefits that the AWU offers to members.

The AWU is a large and diverse Union covering many types of workers in a wide range of industries. It is this rich diversity in backgrounds and experiences that makes all of us stronger.

The AWU has offices and organisers based in Perth, Kalgoorlie, Bunbury, Port Hedland, Karratha, Newman and Onslow always ready to assist Union members. FPU members' interests will also continue to be represented at the highest level of the AWU with a position on the Union's Executive reserved for the FPU area of coverage.

Your current FPU Union dues will remain unchanged until 1 July 2017. The AWU will then offer membership at the AWU Concessional rate for all current FPU members. The concessional rate is currently $8 per week which is tax deductible.

The amalgamation process will take several months to complete and you will be kept up to date by both the FPU and AWU. If you have any questions or concerns in the meantime please feel free to contact the AWU Office on (08) 9221 1686

113 The application to amalgamate was filed on 8 September 2016, which is more than 28 days after the publication of the notice in The West Australian newspaper as required by order 3 of the order made in PRES 2 of 2016 on 20 June 2016.

114 When regard is had to the matters stated in Mr Zoetbrood's statutory declaration made on 7 September 2016, we are satisfied that the application for amalgamation has been authorised in accordance with the rules of the AWUWA (as varied by the order made on 20 June 2016 in PRES 2 of 2016). In particular:

(a) As required by r 50(3), the proposed amalgamation was approved by a majority vote of the executive:

(i) on 10 June 2016 the executive met and unanimously approved the proposed amalgamation of the AWUWA with the FPU; and

(ii) at the meeting of the executive on 10 June 2016, as required by r 22 (when read with r 24), a quorum of the executive was present when the motion to approve the amalgamation was passed.

(b) The process for informing the members of the proposed amalgamation and the reasons therefor by a notice to the members of the AWUWA was effected in accordance with the procedure prescribed in r 50 (as varied by the order made on 20 June 2016).

Satisfied of compliance with the requirements of the IR Act

115 In his statutory declaration made on 7 September 2016, Mr Zoetbrood states there have been no objections to the resolution to amalgamate the two organisations, nor have there been any subsequent objections forwarded to either of the applicant organisations. The Commission records also reveal that no objections to the application to register the proposed amalgamated organisations or to the proposed rules of the proposed amalgamated organisation were received by the Registrar until after the application was heard by the Full Bench on 7 November 2016. On 14 November 2016, 15 notices of objection were filed.

116 After careful consideration of the evidence and the orders made pursuant to s 66 of the IR Act, we are satisfied, as required by s 55(4) of the IR Act, that:

(a) the application has been authorised in accordance with the rules of both organisations; and

(b) reasonable steps have been taken to adequately inform their members:

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

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

(iii) that the members or any of them have not objected to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar.

117 We are also satisfied as required by s 55(4)(d) of the IR Act, that the rules of the proposed organisation provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal.

118 Rule 36 of the rules of the proposed organisation provides for the following procedure:

(1) Notwithstanding anything contained in these rules, and subject to the provisions of the Industrial Relations Act 1979 and any subsequent amendment thereof, no rule shall be altered or repealed, and no new rule shall be added except by a majority vote of the members present in person at a General Meeting of the Union specially called for the purpose, of which seven days' previous notice, specifying the time, place and objects of such meeting shall have been given.

(2) Notice of such General Meeting shall be given by publication of an advertisement in a newspaper circulating in the district in which the head office of the Union is situated, and by posting a copy of the notice in a conspicuous place outside the said office. Fifteen members shall form a quorum at such meeting. Such alterations, repeals or additions of rules shall be subject to the requisites of the Industrial Relations Act 1979 and any subsequent amendment thereof, and shall be registered with the Registrar of WAIRC.

(3) An alteration to these Rules shall not be or become effective until the Registrar of WAIRC has given to the Union a Certificate that the alteration has been registered pursuant to the Industrial Relations Act 1979.

(4) No application shall be made to the Registrar of WAIRC for the registration of any proposed alteration to these Rules unless the Union has taken reasonable steps to adequately inform financial members of the proposed alteration and the reasons.

(5) Further to subrule (4), the Union shall also inform the financial members that

(i) The union intends to apply to the Registrar of WAIRC for the registration of the proposed alteration after the expiration of 28 days from the date of the publication of notice in the West Australian newspaper.

(ii) The members or any of them may object to the proposed alteration by forwarding written objection to the Registrar of WAIRC to reach the Registrar no later than 28 days from the date of the publication of the notice in the West Australian newspaper.

(6) Where the Union and another organisation propose to amalgamate, the provisions of Rule 50- Amalgamation shall apply in lieu this Rule.

119 Pursuant to s 55(4)(e) of the IR Act, the rules of the proposed organisation relating to elections for office must provide that elections shall be by secret ballot and conform with the requirements of s 56(1) of the IR Act, and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

120 The proposed rules of the amalgamated organisation relating to elections are the same as the current rules of the AWUWA. Compliance with the provisions of the IR Act, in respect of the rules of a new organisation, were considered at some length on the last occasion the AWUWA amalgamated with another organisation. In ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA*** [2012] WAIRC 00845; (2012) 92 WAIG 1713, the current rules of the AWUWA were before the Full Bench in a proposed form. The current rules were comprehensively reviewed by the Full Bench and found to comply with the requirements of the provisions of the IR Act.

121 In this matter, the applicants provided to the Full Bench a document which summarises each of the rules of the proposed amalgamated organisation that make provision for compliance with the provisions of the IR Act in respect of elections and the duties and functions of its officers. This document summarises the following provisions as follows:

4 Provision for the Election of Office Holders

Rule 31A(8) and Rule 30(9) provide for elections to be conducted by secret ballot in compliance with s55(4)(e) and 56(1)(d)(i).

Rule 31(1)(b)(i) ensures that no irregularities can occur in relation to the election in compliance with s55(4)(e) and 56(1)(d)(iii)

Rules 31(1) and 49(8) provide for the returning officer not to be connected to the Union in compliance with s56(1)(a).

Rule 31(6) provides for the returning officer to allow candidates to rectify defective nominations in compliance with s56(1)(b).

Rule 31(17) sets out the method of election of office holders in compliance with s56(1)(c).

Rule 31(5) makes provision for absent voting in compliance with s56(1)(d)(ii)(I)

Rule 29 sets out the manner in which persons can become candidates for elections.

Rule 31 set [sic] out the duties and conduct of the returning officer.

Rules 31 and 31A provide for the conduct of the ballot.

Rule 31(8) and (9) provide for the appointment, conduct and duties of scrutineers.

Rule 31(10) provides for the declaration of the results of ballot by the returning officer in compliance with s56(1)(d)((ii)(VI)

Rules 24(1) and 30(1) provide for the period of elected positions not exceeding four years in compliance with s56(1)(e).

Rule 32 provides for the filling of casual vacancies not exceeding the unexpired part of the term of office in compliance with s56(1)(f).

5. Settlement of Disputes

Rule 44 provides for the settlement of disputes with members in compliance with s110(1).

Other Provisions for Rules of Organisations

6. Organisation Seal

Rule 43 provides for a common seal, its custody and use.

Rule 39 provides for use of the seal for executing agreements, deeds and instruments.

7. Meetings

Rules 20 provides for the calling, advertising and business of Annual General, General and Extraordinary General Meetings.

Meetings of the Executive may be called by the President or Secretary in accordance with Rules 34(1)(b) and 35(1)(m).

Rules 20(5) and 22 provide for the quorum at meetings.

Rule 23 sets out the voting at meetings.

8. Deeds and Instruments

Rule 39 provides for the making of agreements, deeds and instruments by the Union.

9. Representation

Rule 38 provides for the representation of the Union.

10. Property and Investments

Rule 15 provides for the control of property and funds by the Executive.

11. Accounts

Rule 16 provides for the keeping of accounts, balance sheets and audit. The financial year specified at rule 16(1).

12. Audit of Accounts

Rules 46 provides for the appointment of auditors to examine books, balance sheets, receipts and documents at least yearly. Auditors cannot be members of the Union.

Rule 16(2) provides for audited balance sheets and report to be filed with WAIRC Registrar within one month of completion of the Auditor's report.

13. Register of Members

Rule 10(1) provides for the keeping of correct register of members in compliance with s63(1)(a).

Rule 10(2) provides for purging of the register of members in compliance with s64D.

Rule 35(1)(h) further provides for the Secretary to keep a correct register of members.

14. List of Office Bearers

Rule 10 provides for the keeping of correct register of officers in compliance with s63(1)(b).

15. Elections

Rule 30(1) and (3) provide the dates and times for the opening and closing of nominations for elections.

Rule 30(2) provides for the advertising of nominations of candidates for elections to be advertised.

Rule 31(6) provides the period of time for correcting defective nominations in accordance with s56(1)(b).

Rule 31A(8) provides the times and dates for opening and closing of ballots. Rule 31A(9) provides for the closing date to be published in newspaper or official Union publication.

Rule 31A(2) provides for the order of candidates names on the ballot paper to be determined by lot drawn by the returning officer.

Rule 31(17) provides for the voting method for the ballot by placing a cross.

Rule 31A(11) provides the date for successful candidates to take office.

16. Duties

Rule 27 sets out the powers and duties of members of the Executive.

Rule 34 sets out the duties and powers of the President and Vice-Presidents.

Rule 35 sets out the duties and powers of the Secretary and Assistant Secretary.

18. Objects

Rule 3 sets out the objects of the Union.

19. Dissolution

Rule 45 provides for the dissolution of the Union.

21. Membership

Rule 6 provides the procedure for application for membership.

Rule 12 provides for the rate of membership dues to be determined under the Rules of *The Australian Workers' Union* as registered with the *Fair Work Act 2009*.

Rule 7 provides the procedure for resignation from the Union.

22. Casual vacancies

Rule 32 provides for filling of vacant offices.

122 We are satisfied that the name of the proposed organisation does not contravene s 59 of the IR Act. Section 59 provides that the Full Bench shall not authorise the registration of an organisation under a name identical with that by which any other organisation has been registered or which by reason of its resemblance to the name of another organisation or body or for any other reason is, in the opinion of the Full Bench, likely to deceive or mislead any person. Although the proposed organisation will bear the same name as the AWUWA, once registered, the AWUWA in its current form will cease to exist so no issue will arise about registration of an organisation under a name that is identical by which any other organisation has been registered.

123 Pursuant to s 63(1)(a) and s 63(1)(b) of the IR Act, an organisation is required to keep records of the residential address of each member and each office holder. Proposed r 10, however, requires the secretary to keep a register of postal addresses of members and officers. It is notable that s 63(1)(a) and s 63(1)(b) are not required by the provisions of the IR Act to be expressly contained in the rules of an organisation. Further, if this rule comes into operation it will not absolve the FPU from complying with s 63(1)(a) and s 63(1)(b) of the IR Act. However, to ensure compliance with s 63(1)(a) and s 63(1)(b), a subsequent amendment to the rules of the new organisation is desirable.

124 For these reasons, we are of the opinion that the Full Bench should authorise the Registrar to register the new organisation. Pursuant to s 58(2) of the IR Act, the Full Bench is empowered to authorise the Registrar to register an organisation unconditionally or subject to the compliance by the organisation with any direction given to it by the Full Bench. However, we are of the opinion that the registration should be subject to the compliance by the organisation with a direction that the following rules be amended to remedy a number of provisions:

(a) Rule 4(40)(e) is identical in terms to r 4(1)(e) of the rules of the FPU. It provides an exclusion from membership of not only persons who are eligible to join any other existing industrial union, but also persons who are eligible to join the Australasian Meat Industry Employees' Union Industrial Union of Workers', Western Australian Branch, Perth; The Western Australian Bakers', Pastrycooks' and Confectioners' Union of Workers and The Federated Engine Drivers' and Firemens' Union of Workers of Western Australia, Perth. These are all organisations that have ceased to exist. When the Act was first enacted as the *Industrial Arbitration Act 1979* (WA) organisations were referred to as industrial union or unions. An industrial union or unions was defined in s 6 of that Act to mean an industrial union registered under that Act. The term 'industrial union' was subsequently amended to 'organisation'. Consequently, we are of the opinion that r 4(40)(e) should be updated to delete the words in r 4(40)(e) and substitute the following words, 'PROVIDED such persons are not eligible to join any other existing organisation registered under the *Industrial Relations Act 1979*'.

(b) Rule 10(1) of the proposed rules of the amalgamated organisation should be amended by deleting the word 'postal' that appears twice and substitute the word 'residential', or alternatively by adding after the word 'postal' that appears twice the words 'and residential'.

(c) Rule 12 of the proposed rules of the amalgamated organisation refers to the rules of the Australian Workers' Union as registered with Fair Work Australia. This provision should be updated to delete the word 'Australia' and substitute the word 'Commission'.

(d) Rule 19 should be amended by deleting the words 'BY Order No 2198 of 1997 of the 15 December 1997'.

(e) Rule 26(11) should be amended by deleting the word 'Arbitration Act,' and substitute the word 'Relations Act'.

2016 WAIRC 00932

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS
	APPLICANTS
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 14 DECEMBER 2016
FILE NO.	FBM 2 OF 2016
CITATION NO.	2016 WAIRC 00932

Result	Order issued
Appearances	
Applicants	Mr C Young and Mr M Zoetbrood on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers
	and
	Mr D Rafferty (of counsel) and with him Mr P O'Keeffe on behalf of The Food Preservers' Union of Western Australian Union of Workers

Order

This matter having come on for hearing before the Full Bench on 7 November 2016 and 14 December 2016, and having heard Mr C Young and Mr M Zoetbrood on behalf of the applicant, The Australian Workers' Union, West Australian Branch, Industrial Union of Workers, and Mr D Rafferty (of counsel) and Mr P O'Keeffe on behalf of the applicant, The Food Preservers' Union of Western Australia Union of Workers, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (the Act), hereby orders that —

1. The Registrar be and is hereby authorised to register a new organisation to be known as 'The Australian Workers' Union, West Australian Branch, Industrial Union of Workers', in accordance with s 72(1) of the Act, being the product of the amalgamation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Food Preservers' Union of Western Australia Union of Worker, subject to it then complying with the direction given by the Full Bench in the Schedule of this order.

2. The rules attached to the application filed herein on 8 September 2016, subject to the amendments set out in the Schedule hereto, are authorised pursuant to s 58(2) of the Act, and hereby declared to be the rules of 'The Australian Workers' Union, West Australian Branch, Industrial Union of Workers'.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

SCHEDULE

Following registration of the new organisation, steps are to be taken forthwith to alter its rules in accordance with r 36 of its rules as follows:

1. Rule 4(40)(e) should be amended by delating the words in r 4(40)(e) and substituting the following words, 'PROVIDED such persons are not eligible to join any other existing organisation registered under the Industrial Relations Act 1979'.
2. Rule 10(1) of the proposed rules of the amalgamated organisation should be amended by deleting the word 'postal' that appears twice and substituting the word 'residential', or alternatively by adding after the word 'postal' that appears twice the words 'and residential'.
3. Rule 12 should be amended by deleting the word 'Australia' and substituting the word 'Commission'.
4. Rule 19 should be amended by deleting the words 'BY Order No 2198 of 1997 of the 15 December 1997'.
5. Rule 26(11) should be amended by deleting the words 'Arbitration Act,' and substituting the words 'Relations Act'.

2016 WAIRC 00935

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS AND THE FOOD PRESERVERS' UNION OF WESTERN AUSTRALIA UNION OF WORKERS
	APPLICANTS
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 15 DECEMBER 2016
FILE NO.	FBM 2 OF 2016
CITATION NO.	2016 WAIRC 00935

Result	Order issued
Appearances	
Applicants	Mr C Young and Mr M Zoetbrood on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and Mr D Rafferty (of counsel) and with him Mr P O'Keeffe on behalf of The Food Preservers' Union of Western Australian Union of Workers and Mr C Fogliani (of counsel) on behalf of Ms A Ristevska, Mr B Rizzo and Mr G Tupluk

Order

This matter having come on for hearing before the Full Bench on 7 November 2016 and 14 December 2016, and having heard Mr C Young and Mr M Zoetbrood on behalf of the applicant, The Australian Workers' Union, West Australian Branch, Industrial Union of Workers, Mr D Rafferty (of counsel) and Mr P O'Keeffe on behalf of the applicant, The Food Preservers' Union of Western Australia Union of Workers, and Mr C Fogliani (of counsel) on behalf of Ms Andrijana Ristevska, Mr Ben Rizzo and Mr Glenn Tupluk, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) (the Act), hereby orders that —

1. The applications to extend time to file and serve notices to object on behalf of the following members of the FPU:
   Madhieu Akot
   Michael Cox
   Nadia (Yosufi)
   Gabriela Cremanaru
   Vladimir Medvedev
   Seokyoung Heo
   James Cotton
   be and are hereby dismissed.

2. The applications to be heard as objectors by:

Andrijana Ristevska
Ben Rizzo
Mark Reyes
Glenn Tupluk
Stephen Matthews
Ian Bryson
Jordan Gontran
Vinh Thanh Nguyen

be and are hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Declarations made under Section 71—

2017 WAIRC 00041

APPLICATION FOR DECLARATION PURSUANT SECTION 71(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2017 WAIRC 00041
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER P E SCOTT COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 25 JANUARY 2017
DELIVERED	**:**	MONDAY, 30 JANUARY 2017
FILE NO.	**:**	FBM 4 OF 2016
BETWEEN	**:**	THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS Applicant AND (NOT APPLICABLE) Respondent

CatchWords	**:**	Industrial Law (WA) - Application pursuant to s 71 for declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices that exist within the State organisation
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 7(1), s 71, s 71(1), s 71(2), s 71(3), s 71(4) *Fair Work (Registered Organisations) Act 2009* (Cth)
Result	**:**	Declaration issued
Representation:		
Applicant	**:**	Mr C F Young

Case(s) referred to in reasons:

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

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

Re Bonny [1986] 2 Qd R 80

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

Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers [2012] WAIRC 01004; (2012) 92 WAIG 1882

Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers [2016] WAIRC 00966

Reasons for Decision

THE FULL BENCH:

Introduction

1 The Full Bench had before it an application made under s 71 of the *Industrial Relations Act 1979* (WA) (the Act) in which the applicant, a State organisation, seeks the following declarations:

(a) pursuant to s 71(2) of the Act, The Australian Workers' Union, West Australian Branch is the counterpart Federal body (the counterpart Federal body) of the applicant and that the rules of the applicant and the counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same; and

(b) pursuant to s 71(4) of the Act, the offices within the counterpart Federal body are the same or deemed to be the same as the offices in the applicant.

2 After hearing the applicant on Wednesday, 25 January 2017 the Full Bench found the application should be granted and made a declaration in terms sought by the applicant: [2016] WAIRC 00039. These reasons set out the reasons why the Full Bench granted the application.

3 Pursuant to s 71(1) of the Act, the counterpart Federal body of a State organisation is the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), the rules of which:

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

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

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

4 The applicant made the application following its registration as a new organisation as a result of an amalgamation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Food Preservers' Union of Western Australia Union of Workers (FPU): [2016] WAIRC 00932; ***Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** [2016] WAIRC 00966.

5 The purpose of the application is to enable the orderly and efficient administration and coordination of the applicant's functions and duties and its counterpart Federal body. Obtaining the declarations is a step towards the applicant being able to obtain a s 71 certificate to enable the offices that exist in its rules, to be held by persons holding corresponding offices in its counterpart Federal body. A certificate will exempt the applicant from holding elections for its offices as defined in s 7(1) of the Act. A certificate will also enable it to make an agreement (if it wishes to do so) relating to the management and control of funds with The Australian Workers' Union (AWU) of which the counterpart Federal body is a Branch.

6 No objections were received to the application for declarations in this matter from any person.

Are the qualifications of persons for membership of the State organisation and the counterpart Federal body substantially the same?

7 Pursuant to s 71(2) of the Act, the rules of a State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same. 'Substantial' means what is 'real or of substance as distinct from ephemeral or nominal' or 'considerable' or 'in the main essentially': ***Re an application by the Civil Service Association*** (1993) 73 WAIG 2931; ***Re Bonny*** [1986] 2 Qd R 80, 82.

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

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

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

9 Both the applicant and its counterpart Federal body cover a wide variety of businesses, callings, manufacturers, undertakings, industries and occupations.

10 Whilst the applicant was recently registered as a new State organisation following the amalgamation, its eligibility rules are the eligibility rules of a number of amalgamations that have occurred in the past and result from a longstanding organisation which effectively could be said to have been registered since 18 July 1941: ***Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** [2012] WAIRC 00032; (2012) 92 WAIG 102 [144].

11 In a statement made on 16 December 2016 by Mr Mike Zoetbrood, the secretary of the applicant, he states that:

(a) as at 14 December 2016 there were 7,308 members of the applicant and 7,142 members of the counterpart Federal body;

(b) prior to the amalgamation with the FPU there were 7,059 members of the previously registered State organisation and 249 members of the FPU;

(c) as of 14 December 2016, 249 of the members of the applicant are not eligible to be members of the counterpart Federal body and these are all persons who were previously members of the FPU;

(d) there are 83 members of the counterpart Federal body who are engaged in the manufacture of fertilisers and chemicals pursuant to r 5, s 2, pt C(7)(i) of the rules of the AWU who are not eligible to join the applicant; and

(e) there are 17 members of the counterpart Federal body who are engaged by Energy Developments Ltd pursuant to r 5, s 6, pt N(29) of the rules of the AWU who are not eligible to join the applicant.

12 Attached to the statement made by Mr Zoetbrood is attachment 3 which compares the eligibility rules of the applicant and its counterpart Federal body. Having examined the matters set out in attachment 3 and having read the eligibility rules of the applicant and the counterpart Federal body, it is clear that, with the exception of the eligibility rule of the applicant in r 4(40) and r 4(41) which provide for eligibility of the former members of the FPU and the additional categories of eligibility for membership in the rules of the AWU of persons engaged in the manufacture of fertilisers and chemicals and persons engaged by Energy Development Ltd, the categories of eligibility are identical or are substantially the same.

13 Prior to the amalgamation with the FPU and following an amalgamation with The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA (FPFAI) on 19 September 2012, The Australian Workers' Union, West Australian Branch, Industrial Union of Workers applied for and was granted s 71 declarations. In its reasons for decision, the Full Bench observed that the eligibility rules of the applicant contained a number of outdated occupations: ***Re The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** [2012] WAIRC 01004; (2012) 92 WAIG 1882. However, this is not a matter that is material as, pursuant to s 71(2) of the Act, an assessment of the rules of the State organisation and its counterpart Federal body is not concerned with the question whether categories of qualifications of persons for membership are obsolete.

14 Consequently, when regard was had to the eligibility rules of the applicant and its counterpart Federal body, the Full Bench formed the opinion the qualification of persons for membership rules in respect of each organisation are substantially the same and a declaration in these terms should be made by the Full Bench.

Are the offices that exist in the counterpart Federal body the same as the offices of the State organisation?

15 Pursuant to s 71(4) of the Act, the rules of a counterpart Federal body prescribing the offices which shall exist are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the counterpart Federal body. When determining whether the offices that exist in the counterpart Federal body are the same as the offices of the State organisation, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: ***Jones v Civil Service Association Inc*** [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J).

16 The offices of the applicant and its counterpart Federal body are as follows:

State Executive positions	**Branch Executive positions**
President Rules 24(1), 27, 34(1) and (2)	Branch President Rules 33(7)(l), 35(5) and (6), 38(1) and (2)
Two Vice-Presidents Rules 24(1), 27, 34(3)	Two Branch Vice-Presidents Rules 33(7)(l), 35(5) and (6), 38(3)
Secretary Rules 24(1), 27, 35(1)	Branch Secretary Rules 33(7)(l), 35(5) and (6), 39(1)
Assistant Secretary Rules 24(1), 27, 35(2)	Branch Assistant Secretary Rules 33(7)(l), 35(5) and (6), 39(2)
Nine Executive Committee Members Rules 24(1), 27	Nine Branch Executive Committee Members Rules 33(7)(l), 35(5) and (6).
	Alcoa Pinjarra Sub-Branch President Rules 33(7)(l) and (m), 35(5) and (6).
	Alcoa Pinjarra Sub-Branch Secretary Rules 33(7)(l) and (m), 35(5) and (6).

17 As s 71(4) of the Act only requires for every office in the State organisation there is to be a corresponding office in the Branch, that is its counterpart Federal body, it is immaterial that the counterpart Federal body has two additional offices for which the rules of the applicant establish no equivalent.

18 In 2012, the Full Bench comprehensively reviewed the rules of previously registered organisation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers after it amalgamated with the FPFAI and the rules of its counterpart Federal body that set out the functions and powers of the offices of each organisation [14] - [55]. After considering the functions and powers of the offices of each organisation, the Full Bench found that a declaration could be made that for each office in the State organisation there was a corresponding office in the counterpart Federal body [55].

19 Prior to the amalgamation with the FPU in 2016, alterations to the rules of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers were registered by the Registrar on 5 August 2013 (APPL 37 of 2013) and on 6 October 2014 (APPL 22 of 2014). Having reviewed each of the alterations registered by the Registrar it is clear that those alterations made no material changes to the powers and functions of the offices of president, the vice-presidents, secretary, assistant secretary and executive committee members.

20 As the Full Bench recently observed in its reasons for decision, authorising the Registrar to register the applicant as an amalgamated organisation on 14 December 2016, the proposed rules of the new organisation which are now the rules of the applicant (with the exception of r 4(40) and r 4(41) which replicate the eligibility rules of the FPU) are identical to the previous rules of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers prior to the amalgamation [10].

21 In this matter, the Full Bench also reviewed each of the rule changes made to the rules of the AWU that were certified by the General Manager of the Fair Work Commission pursuant to the *Fair Work (Registered Organisations) Act* subsequent to the s 71 declarations made by the Full Bench on 19 September 2012. In particular, the Full Bench reviewed the text of the variations consented to by the General Manager in the following applications:

Document No	Decision Medium Neutral No	Date of Decision
R2016/304	[2016] FWCG 8972	20 December 2016
R2016/290	[2016] FWCG 8801	7 December 2016
R2016/208	[2016] FWCG 6885	26 September 2016
R2016/159	[2016] FWCG 5704	17 August 2016
R2016/93	[2016] FWCG 3553	3 June 2016
R2015/154	[2016] FWCG 1822	24 May 2016
R2015/216	[2015] FWCG 6655	29 September 2015
R2015/43	[2015] FWCD 1866	19 March 2015
R2014/302	[2014] FWCD 9172	19 December 2014
R2013/496	[2014] FWCD 145	7 January 2014
R2013/244	[2014] FWCD 2822	19 December 2013
R2013/84	[2013] FWCD 3494	22 November 2013
R2013/311	[2013] FWCD 5012	25 July 2013
R2012/193	[2012] FWAD 9730	23 November 2012

22 Having read the text of each of the variations certified by the General Manager or her delegate in the fore mentioned table, the Full Bench formed the opinion the powers and functions of the offices of branch president, vice-president, branch secretary, branch assistant secretary and the branch executive committee members have not materially changed since the rules of the counterpart Federal body were considered by the Full Bench in 2012.

23 For these reasons, the Full Bench formed the opinion that for each office in the applicant there is a corresponding office in the counterpart Federal body and that a declaration in these terms should be made by the Full Bench.

2017 WAIRC 00039

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN WORKERS' UNION, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-and-

(NOT APPLICABLE)

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT

CHIEF COMMISSIONER P E SCOTT

COMMISSIONER D J MATTHEWS

DATE WEDNESDAY, 25 JANUARY 2017

FILE NO. FBM 4 OF 2016

CITATION NO. 2017 WAIRC 00039

Result Declaration issued

Appearances

Applicant Mr C F Young

Declaration

This matter having come on for hearing before the Full Bench on 25 January 2017, and having heard Mr C F Young on behalf of the applicant, the Full Bench being of the opinion upon the evidence that the rules of the applicant and The Australian Workers' Union, West Australian Branch, its counterpart Federal body, relating to the qualifications of persons for membership of each such body are substantially the same, and the Full Bench also being of the opinion that the rules of the counterpart Federal body prescribing the offices which exist in the branch are the same in this respect as the rules of the applicant, it is this day, 25 January 2017, declared as follows:

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

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

By the Full Bench

[L.S.] THE HONOURABLE J H SMITH, ACTING PRESIDENT.

PRESIDENT—Matters dealt with—

2017 WAIRC 00063

A STAY OF OPERATION OF THE ORDER IN MATTER NO. B 159 OF 2016 WHICH IS THE SUBJECT OF FBA 1 OF 2017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2017 WAIRC 00063
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	FRIDAY, 3 FEBRUARY 2017
DELIVERED	**:**	TUESDAY, 7 FEBRUARY 2017
FILE NO.	**:**	PRES 1 OF 2017
BETWEEN	**:**	SPOTLESS GROUP
		Applicant
		AND
		DENNIS BUCKLE
		Respondent

CatchWords	**:**	Industrial Law (WA) - Application to stay operation of order - Instituting an appeal - Whether capacity to repay the judgment debt if the appeal is successful - Application dismised - Turns on own facts
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 49, s 49(11)
		Fair Work Act 2009 (Cth) s 119
Result	**:**	Order made
Representation:		
Applicant	**:**	Ms H R Millar (of counsel)
Respondent	**:**	In person
Solicitors:		
Applicant	**:**	Herbert Smith Freehills

Case(s) referred to in reasons:

Biotechnology Australia Pty Ltd v Pace (1998) 15 NSWLR 130

Hamersley Iron Ore Pty Ltd v Lovell (No 2) (1998) 20 WAR 79

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers [2005] WAIRC 02983; (2005) 85 WAIG 3918

Kofi-Sunkersette Obu v A Strauss & Co Ltd [1951] AC 243

Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [2008] WASCA 222; BC200809724

Vosebe Pty Ltd t/as Batemans Bay Window and Glass v Bakavgas [2008] NSWCA 55

Case(s) also cited:

Eastland Technology Australia Pty Ltd and Others v Whisson (2003) 28 WAR 308

Reasons for Decision

Introduction

1 This is an application under s 49(11) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant seeks an order that the operation of the decision made by the Commission on 16 January 2017 in B 159 of 2016 be stayed, pending the hearing and determination of appeal FBA 1 of 2017.

2 The decision sought to be stayed is an order that the applicant (the respondent at first instance) forthwith pay to the respondent (the claimant at first instance) the sum of 11 weeks of pay at the respondent's Fixed Annual Remuneration rate as at the date of his termination: [2017] WAIRC 00024.

3 After hearing oral submissions and evidence on oath given by Mr Buckle (the respondent), an order was made dismissing the application: [2017] WAIRC 00050. These reasons set out why I determined the application for a stay of the decision should be dismissed.

Grounds of appeal and the grounds in support of a stay

4 The grounds of appeal in FBA 1 of 2017 are as follows:

> 1. The Commissioner erred in finding that the Applicant had a contractual right to redundancy pay when in fact the provisions in the Applicant's contract regarding redundancy entitlements were uncertain or illusory.
>
> 2. The Commissioner erred in quantifying the Applicant's redundancy pay based on the schedule contained in National Employment Standards (s119 of the *Fair Work Act 2009* (Cth) (the Act)) but disregarding the 'ordinary and customary turnover of labour' exception to redundancy entitlements which also forms part of the National Employment Standards (also s119 of the Act). Even if regard could be had to external standards, in accordance with case law which allows such recourse in certain circumstances of contractual uncertainty (*Biotechnology Australia Pty Ltd v Pace* (1998) 15 NSWLR 130), it is not open to the Commission to selectively apply aspects of the external standard while disregarding others.

5 Attached to the application for a stay is a statutory declaration made by Giacomo Edmondson Giorgi, solicitor, made on 20 January 2017. Mr Giorgi is a solicitor in the employ of the applicant's solicitors and was the instructing solicitor in respect of the matter at first instance. In his statutory declaration, he stated that the applicant instructed his firm to seek a stay of the decision, pending the determination of the appeal by the Full Bench, on the basis that:

> (a) were the applicant to pay the monies ordered by the Commission and its appeal is subsequently successful, there is a real prospect that the respondent would not have the capacity to repay the judgment debt given that, on his own evidence, he has not worked since June 2016;
>
> (b) the respondent's evidence during the proceedings at first instance was that he believed that the applicant had made no effort to help him obtain alternative employment and had not treated him consistently with others in the business;
>
> (c) given the respondent's evidence, the applicant believes that if monies were paid now in accordance with the requirements of the decision and then ordered to be repaid later after a successful appeal, the respondent may refuse to comply with the order for repayment; and
>
> (d) an inability to recover the judgment debt in the event of a successful appeal would render the appeal nugatory.

6 In a written submission attached to the application, the applicant stated that it considers that its prospects of success in the appeal are strong on grounds that the Commissioner erred in two respects by:

> (a) determining that the redundancy provisions of the respondent's employment contract were not so uncertain to be void or illusory; and
>
> (b) adopting certain elements of the redundancy entitlements set out in s 119 of the *Fair Work Act 2009* (Cth) whilst ignoring others, ie, the 'ordinary and customary turnover of labour' exception contained in the same section of the *Fair Work Act*.

7 The applicant in its submissions argued that:

> (a) its case is supported by case law which allows judicial intervention in order to preserve a contractual bargain, but which prohibits tribunals from drafting new agreements for the parties: ***Biotechnology Australia Pty Ltd v Pace*** (1998) 15 NSWLR 130 at 132G and ***Kofi-Sunkersette Obu v A Strauss & Co Ltd*** [1951] AC 243;
>
> (b) whilst courts allow tribunals to apply an established external standard in order to give meaning to uncertain contractual terms, they must act reasonably in the application of that standard and cannot apply its terms selectively: ***Biotechnology*** (136) and (141);
>
> (c) inconvenience would be caused by it attempting to recover the funds from the respondent and the tax office in the event of a successful appeal which weighs in favour of the stay being granted; and

(d) the balance of convenience favours a stay being granted, given that a failure to do so may render the appeal nugatory and given the strength of the applicant's prospect of success in the appeal.

8 At the hearing of the application for a stay, counsel for the applicant, Ms Millar, stated that the factual basis for the submission that there is a risk the respondent would not be able to repay the money without difficulty or delay is on grounds that the respondent's employment ceased in mid-2016. However, the respondent gave uncontroverted evidence on oath that he does have the capacity to repay the judgment sum in the event the appeal is successful. Whilst he describes himself as retired, he has a small pension paid from the United Kingdom, is self employed as a marriage celebrant, has access to funds in superannuation and owns two unencumbered properties. When cross-examined, the respondent gave an undertaking that he would be willing to repay the judgment sum without delay or difficulty in the event the appeal is successful.

9 The respondent also pointed out when making a submission that any issue of repayment on taxation on the judgment sum should not arise as the contractual benefit found to be owing by the Commission at first instance is an amount of a redundancy payment which is tax free.

Consideration of the application for a stay

10 The first requirement of s 49(11) of the Act is that an appeal must be instituted to the Full Bench under s 49. I was satisfied that this has occurred. Secondly, the stay application must be filed by a person or persons who have a sufficient interest to make the application. Again, I was satisfied that as the applicant is a party against whom the order to pay was made, it has a sufficient interest to make the application for a stay.

11 The applicant in its written submissions points out that superior courts have held that a stay may be granted if the applicant appears to have reasonable prospects of success and there is a real risk that, if a stay is not granted and the judgment debt is paid, the respondent will be unable to repay the monies if the appeal is allowed: ***Vosebe Pty Ltd t/as Batemans Bay Window and Glass v Bakavgas*** [2008] NSWCA 55 at [18], [21] - [22], ***Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd*** [2008] WASCA 222; BC200809724 at [22] and ***Hamersley Iron Ore Pty Ltd v Lovell (No 2)*** (1998) 20 WAR 79 at 89 - 90.

12 The principles which apply in deciding whether or not to order a stay of a decision are well established. The discretionary grounds upon which a stay will be granted pending the determination of an appeal require the demonstration of special circumstances to justify the departure from the ordinary rule that a successful litigant is entitled to the fruits of the judgment. Therefore, something special or unusual is required before a stay will be granted. In ***John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers*** [2005] WAIRC 02983; (2005) 85 WAIG 3918 the relevant principles were summarised by Ritter AP at [34] - [37] as follows:

> In *Federal Commissioner of Taxation v Myer Emporium Limited (No 1)* [1986] 160 CLR 220, Dawson J at 222 said that the discretion to '*order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal…. Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory…. Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed*'.
>
> These observations were cited with approval by Pullin J in *Commonwealth Bank v Bouwman* [2003] WASC 205 and by Anderson J, with whom Pidgeon J agreed, in *Hamersley Iron Pty Ltd v Lovell (No 2)* (1998) 20 WAR 79 at pages 89-90. In the latter case, Anderson J said:-
>
> > '*… unless a stay is necessary to preserve the subject matter or integrity of the litigation in the broader sense described above the circumstances will not be regarded as sufficiently exceptional to enliven the discretionary jurisdiction to provide a stay. Only if the applicant can show that a stay is necessary to that end will the High Court go on to consider matters such as whether the application for special leave has a prospect of success, whether a stay will occasion hardship to the respondent, where the balance of convenience lies and so on. I think such matters are always treated as secondary to the question whether a stay is necessary to preserve the subject matter or integrity of the litigation. They come into play only if it appears that the refusal of a stay will substantially deprive the applicant of the benefit to be derived from the appeal. Thus, an applicant may fail to obtain a stay even if the applicant can show that unless there is a stay the appeal would be futile.*'
>
> The reasons of Anderson J were cited with approval by Sharkey P in *G & M Partacini t/as Bayswater Powder Coaters v SDAE* (2005) 85 WAIG 51. In that decision, Sharkey P emphasised that the jurisdiction to grant a stay should also be exercised having regard to the requirements of s 26 of the Act and the '*need to prevent there being any more uncertainty than is necessary, in industrial matters*'.
>
> In *Eastland Technology Australia Pty Ltd and Others v Whisson and Others* (2003) 28 WAR 308, the court (Murray and Parker JJ) at 311 distilled generally applicable principles in relation to applications for stays of orders. These principles were set out as follows:-
>
> > '• *The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.*
> >
> > • *It is for the applicant for a stay to move the court to a favourable exercise of its discretion.*

• It will not do so unless special circumstances are shown justifying the departure from the ordinary rule.

• The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.

• If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.

• If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.'

13 It is not appropriate for me to reach any conclusion about the strength of the applicant's case on appeal. I am only required to be satisfied there is some issue of substance to be raised. Having reviewed the notice of appeal and having read the reasons for decision given by the Commission on 5 January 2017, together with having briefly read the transcript of the proceedings at first instance and having considered the arguments put at first instance, I formed the opinion that the grounds of appeal are arguable and thereby support the application for a stay.

14 However, in light of the evidence given by the respondent that he has the capacity to repay the judgment sum and the undertaking given by him, I was not satisfied that there is a risk that the judgment sum will not be repaid or a risk that there will be a difficulty in repayment in the event that the appeal is successful and the decision requiring payment of the judgment sum is quashed.

15 In these circumstances, I was not satisfied that a stay order is necessary.

2017 WAIRC 00050

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SPOTLESS GROUP
	APPLICANT
	-and-
	DENNIS BUCKLE
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 3 FEBRUARY 2017
FILE NO.	PRES 1 OF 2017
CITATION NO.	2017 WAIRC 00050

Result	Order made
Appearances	
Applicant	Ms H R Millar (of counsel)
Respondent	In person

Order

This matter having come on for a hearing before me on Friday, 3 February 2017, and having heard Ms H R Millar (of counsel) on behalf of the applicant and the respondent in person, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders that —

The application for a stay be and is hereby dismissed.

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

CANCELLATION OF—Awards/Agreements/Respondents—Under Section 47—

2017 WAIRC 00015

CANCELLATION OF VARIOUS AGREEMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 11 JANUARY 2017
FILE NO/S	APPL 6 OF 2017
CITATION NO.	2017 WAIRC 00015

Result Agreements cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following Agreements applied, did give notice on the 30th day of November 2016 of an intention to make an order cancelling those agreements pursuant to s 47 of the *Industrial Relations Act 1979* (the Act);

AND WHEREAS the requirements of s 47(3) of the Act have been met;

AND WHEREAS at the 9th day of January 2017 there were no objections to the making of such an order;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47 of the Act, do hereby order –

THAT the following agreements be cancelled:

A. Goninan & Co. Limited Bassendean Enterprise Agreement 2003

A.B.B. James Watt Pty Ltd Nelson Point Development Project (Enterprise Bargaining Agreement) AG 21 of 1993

ABB Power Transmission Distribution Transformers Division, Osborne Park Location (Enterprise Bargaining Agreement)1993

ABB-EPT Construction Pty Ltd Western Region (Paraburdoo Fines Further Processing Project) Enterprise Bargaining Agreement No. 19 of 1995

ABB – EPT Construction Pty Ltd (Alcoa Kwinana B – 30 Project) Enterprise Bargaining Agreement

ABB Power Transmission, Distribution Transformer Division, Osborne Park Enterprise Agreement 1994

ABB-EPT Construction Pty Ltd Western Region (Kwinana) Enterprise Bargaining Agreement 1994

ABB Engineering Construction Pty Ltd Western Australia (Alcoa Wagerup Refinery Maintenance) Enterprise Bargaining Agreement No. AG 189 of 1996

ABB Engineering Construction Pty Ltd Western Australia (Alcoa Kwinana Refinery Maintenance) Enterprise Bargaining Agreement No. AG 190 of 1996

ABB Engineering Construction Pty Ltd Western Australia (Alcoa Pinjarra Refinery Maintenance) Enterprise Bargaining Agreement No. AG 191 of 1996

ABB Engineering Construction Pty Ltd, Western Australia (Kwinana Factory) Enterprise Bargaining Agreement

ABB ALSTOM POWER LTD - Power Plant Maintenance (W.A.) Agreement

ABB Australia Pty Limited, (ATCS) Component Service, Automation Technology Division, WA Enterprise Agreement, 2003-2006

ACI Plastics Packaging Bentley Enterprise Agreement 2004

Air Drill Enterprise Agreement 2000

All Ports Terminal and Zone Maintenance Enterprise Agreement 2004

Aluminium Fabrication Industry Traineeship Agreement

Aluminium Finishing Traineeship Agreement No. AG 13 of 1988

AMCOR Beverage Cans, Canningvale Operation, Enterprise Bargaining Agreement 2003 to 2006

Amec Services Pty Ltd Alcoa Projects Enterprise Bargaining Agreement 2001 – 2003

Apprentices Fitting and Turning – The Minister for Agriculture Industrial Agreement

Atlas Copco Australia Pty Limited Perth WA Enterprise Agreement 1999
Australian Poultry Limited (Osborne Park) Enterprise Bargaining Agreement 1994
Australian Glass Manufacturers Co. Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1993
Australian Glass Manufacturers Co. Perth, Maintenance Trades (Enterprise Bargaining) Agreement 1994
ACI Glass Packaging - Perth, Maintenance Trades (Enterprise Bargaining) Agreement 2003
ANI Products (WA) Division Enterprise Bargaining Consent Agreement 1993
ANI Bradken Perth, Western Australian Enterprise Bargaining Agreement 1996
ANI Bradken - Western Australia Enterprise Bargaining Agreement 1998
Automotive Dismantler Youth Traineeship Agreement
Bains Harding Industries (South West Division) Enterprise Bargaining Agreement
Bains Harding Industries (Western Power - Kwinana) Enterprise Bargaining Agreement 1998
Bains Harding Industries (Worsley Alumina) Enterprise Bargaining Agreement 1998
Bains Harding Industries (Alcoa Wagerup) Enterprise Bargaining Agreement 1998
Bains Harding Industries (Wesfarmers CSBP) Enterprise Bargaining Agreement 1998
Bains Harding Industries (Alcoa Kwinana) Enterprise Bargaining Agreement 1998
Bains Harding Industries (Manufacturing Division) Enterprise Bargaining Agreement
Bartter Enterprises Pty Ltd (Maintenance Division) Certified Agreement 2004
Benchmark Recruitment (WA) Pty Ltd (CBH Kwinana) Maintenance Agreement 2002
Beltreco Limited (North West) Enterprise Bargaining Agreement 1997
Beltreco Ltd (WA) Malaga Operations Enterprise Agreement 1999
Beltreco North West Operations Enterprise Bargaining Agreement 2000
BHP Building Products Osborne Park Enterprise Agreement 2000/2001
BHP Steel - Rod & Bar Products - Kwinana Works - Steel Industry Enterprise Bargaining Agreement 1993
BHP Iron Ore Enterprise Bargaining Agreement 1997
B.H.P. Transport - Kwinana Enterprise Bargaining Agreement, 1993
BHP Transport Kwinana Enterprise Bargaining Agreement, 1995
BHP Transport Pty Ltd Kwinana Bulk Materials Handling Enterprise Agreement 1998
Binder (WA) Enterprise Bargaining Agreement 1999
Bibra Lake Fabrication Workshop Enterprise Agreement 2003
Email Major Appliances - Belmont Service Technicians Enterprise Agreement 2000

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

INDUSTRIAL MAGISTRATE—Claims before—

2017 WAIRC 00065

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2017 WAIRC 00065
CORAM	**:**	INDUSTRIAL MAGISTRATE M FLYNN
HEARD	**:**	WEDNESDAY, 25 JANUARY 2017
DELIVERED	**:**	WEDNESDAY, 8 FEBRUARY 2017
FILE NO.	**:**	M 47 OF 2016
BETWEEN	**:**	ALDO BECHERELLI

CLAIMANT

AND

MEDITERRANEUS PTY LTD TRADING AS LUCIOLI

RESPONDENT

CatchWords	**:**	INDUSTRIAL LAW – Contravention of civil penalty provisions on terms of a modern award on overtime and penalty rates – Small Claims Procedure.
Legislation	**:**	*Fair Work Act 2009*
Instruments	**:**	Restaurant Industry Award 2010 (MA000119)
Cases referred to in reasons	**:**	***B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266 at 283 ***Kucks v CSR Limited*** (1996) 66 IR 182 ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99 ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28
Result	**:**	Judgment for the claimant
Representation:		
Claimant	:	In person.
Respondent	:	Mr Luca Lucioli, director of the respondent.

REASONS FOR DECISION

Introduction

1 Mr Aldo Becherelli (Mr Becherelli) was employed by Mediterraneus Pty Ltd (the Company) from 24 November 2014 until 20 March 2015. Mr Becherelli was a pastry cook in a business operated by the Company, 'Lucioli' (*Lucioli*). He claims $13,008.98 from the Company, alleged to be overtime and penalty rates to which he is entitled under the provisions of the Restaurant Industry Award 2010 (MA000119) (the Modern Award).

2 The Company disputes the claim on a number of (alternative) grounds. First, the Company submits that the overtime and penalty rate provisions of the Modern Award did not apply in circumstances where, pursuant to the terms of an agreement between Mr Becherelli and the Company made at the commencement of Mr Becherelli's employment, Mr Becherelli was paid an 'over Award' fixed weekly salary of $1,346.15. Secondly, the Company alleged that Mr Becherelli was incompetent ('ingredients had to be thrown out, burnt the products') and engaged in discreditable conduct ('urged other staff to file employment claims', 'threatened and abused other staff') implying that, if proven, these facts would discharge the Company of any legal obligations to Mr Becherelli. Thirdly, the Company submits that a reconciliation of total payments made by it to Mr Becherelli (including alleged cash payments and other non-cash benefits (e.g. 'free meals and drinks')) and the entitlements of Mr Becherelli under the Modern Award (as a 'Level 4, Cook grade 3' and after an appropriate deduction because Mr Becherelli did not give notice of termination) reveals that Mr Becherelli has been paid in excess of his entitlements under the Modern Award.

3 In Schedule I of this decision, I have set out the law relevant to the jurisdiction, practice and procedure of this court in determining this case. In Schedule II of this decision I have set out extracts of the Modern Award as at the period relevant to the claim (24 November 2014 – 20 March 2015).

4 Relevant to matters identified under the heading, 'Jurisdiction' in Schedule I, I am satisfied:

a. Mr Becherelli has elected to use the Small Claims procedure provided for in s 548 of the *Fair Work Act 2009* (FWA).

b. The Modern Award *covers* Mr Becherelli and the Company as provided for in s 48 of the FWA and there are no relevant statutory exceptions. Clause 4 of the Modern Award provides that the award covers employers in the restaurant industry and their employees in the classifications listed in Schedule B. I rely upon the uncontradicted evidence of Luca Lucioli, Salvatore Lucioli and Mr Becherelli, on the:

- operation of *Lucioli*. The evidence was consistent with *Lucioli* being characterised as a restaurant and inconsistent with it being characterised as one of the industries in cl 4.8 of the Modern Award (e.g. fast food etc.);
- the role of Mr Becherelli as a 'pastry cook'. This position is mentioned in the classifications in Schedule B of the Modern Award in the descriptions of a 'Cook' at grades 1-5.

c. The Company is a corporation to which paragraph 51(xx) of the Constitution applies. As a result, the Company is a 'a national system employer' as provided for in s 42 of the FWA.

d. Mr Becherelli was an individual who was employed by the Company. Although the relevant conditions of his employment may be in dispute, the fact that Mr Becherelli was an employee of the Company is not in dispute. As a result, he was a 'national system employee' as provided for in s 42 of the FWA.

5 In order to determine this case, three issues arise for my consideration. First, I must determine the content of the employment agreement made between Mr Becherelli and the Company at the time of the commencement of his employment. Secondly, I must determine the significance of the allegations, made by the Company, of incompetence and discreditable behaviour of Mr Becherelli. Thirdly, I must determine the entitlements of Mr Becherelli under the Modern Award, having particular regard to: my findings on the hours worked by Mr Becherelli; the appropriate classification of Mr Becherelli from the classification

structure set out in Schedule B of the Modern Award; the application of the provisions of the Modern Award on hours of work, breaks, overtime, penalty rates etc.; whether the entitlements of Mr Becherelli under the Modern Award ought be reduced on account of any of the following: above-Award payments to Mr Becherelli; cash payments to Mr Becherelli; non-cash payments to Mr Becherelli; Mr Becherelli failing to give notice of termination as required by the Modern Award.

First Issue: The Agreement Between Mr Becherelli and the Company

6 Mr Becherelli gave evidence of two conversations with representatives of the Company in the period shortly before he commenced working at *Lucioli.* The first conversation was at a meeting between Mr Becherelli, Salvatore Lucioli, Luca Lucioli and Alessandro Lucioli. Mr Becherelli's duties as a pastry chef at the new venture, *Lucioli*, were discussed. Mr Becherelli said that he was interested in the position on the basis that he would receive a salary of $1,000 per week net (i.e. after tax). The Company representatives told him that they would 'get back to him'. The second conversation was between Mr Becherelli and Salvatore Lucioli only and occurred on the occasion of a larger meeting between representatives of the Company and all of the staff who were about to commence working at *Lucioli.* Mr Becherelli's evidence was that Salvatore Lucioli told him words to the effect that the Company agreed to the salary of $1,000 per week but that Mr Becherelli would be expected to work for 40 – 42 hours per week and not 38 hours per week. Mr Becherelli agreed. Mr Becherelli stated that he signed a document presented to him during this meeting and that: he understood that the document related to his employment; he did not read the document; and, despite requests to the Company, he had never been provided with a copy of the document.

7 The evidence of the Company came from Salvatore Lucioli and Luca Lucioli. Their evidence did not contradict the evidence of Mr Becherelli *except* in two respects. First, Salvatore Lucioli's evidence was that Mr Becherelli agreed to work for 45 – 50 hours per week (rather than 40 – 42 hours per week) for a weekly salary of $1,000 per week net. Salvatore Lucioli stated that he left the documentation of this agreement to be done by Luca Lucioli 'who ran the administration'. Secondly, Luca Lucioli gave evidence that: he arranged for the preparation of a document entitled 'Employment Contract' that was intended to reflect the agreement between the Company and Mr Becherelli that Mr Becherelli would be paid $70,000 per annum gross and that this salary was inclusive of any reasonable overtime undertaken by Mr Becherelli; the document was prepared around the time Mr Becherelli commenced his employment; a copy of the document was sent to Mr Becherelli or left with Mr Becherelli for signature and return; and Mr Becherelli failed to return the document. A copy of the document ('the EC Document') was admitted into evidence by Luca Lucioli.

8 Mr Becherelli stated that he had never seen the EC Document before Luca Lucioli produced it at the trial on 25 January 2017. In circumstances where the Company has not produced a copy of the EC Document that has been signed by Mr Becherelli (or by the Company) or independent evidence of the EC Document having been sent to Mr Becherelli (e.g. a copy of an email or a covering letter) or independent evidence of the Company demanding that he return a signed copy (e.g. a copy of an email), I am not satisfied that Mr Becherelli sighted a copy of the document before 25 January 2017. The Company cannot rely upon the contents of the EC document to evidence the content of the agreement between it and Mr Becherelli. This finding is significant insofar cl 7 and cl 8 of the EC document appear to have been drafted in anticipation of Mr Becherelli's employment being governed by cl 28 of the Modern Award on 'Annualised salary arrangements'. If cl 28 of the Modern Award is to govern the entitlements of Mr Becherelli, as alleged by the Company, it will be necessary for the Company to prove an 'agreement between the employer and the employee' (per cl 28.1(a) of the Modern Award) to that effect by reference to evidence other than the supply of the EC Document to Mr Becherelli.

9 As to the conflict in evidence between Mr Becherelli and Salvatore Lucioli as to the agreed number of hours to be worked (40 – 42 *or* 45 – 50), I am not satisfied as to *either* version of the conversation. I am not satisfied that a precise number of overtime hours was discussed. Salvatore Lucioli was commencing a new venture. Salvatore Lucioli was unlikely to know, with precision, the demands to be made upon the new pastry chef that he was keen to employ. Mr Becherelli was keen to accommodate any reasonable demands of his new employer if his demand for a salary of $1,000 net per week was met. I am satisfied that Salvatore Lucioli stated words to the effect that *some* overtime would be required for a salary of $1,000 net per week, particularly as the business commenced operations and that Mr Becherelli agreed to this term. I am satisfied that to give efficacy to this express term it is necessary to imply, as a fact, a term that the amount of overtime required for a salary of $1,000 net per week would be a *reasonable* level of overtime. The other conditions for an implied term as set out in ***B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266 [283] are each satisfied ((1) it must be reasonable and equitable; (2) [efficacy] (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.)

10 I am not satisfied that the express terms of the oral employment agreement as set out by me in paragraph 9 constitutes an agreement to enter an annualised salary arrangement as provided by cl 28 of the Modern Award. Although some features of the agreement between Mr Becherelli and Salvatore Lucioli reflect the mechanism anticipated by cl 28 (weekly salary at least 25% above award), there is no evidence that Mr Becherelli or Salvatore Lucioli made any reference (or were aware of) the Modern Award or the content of the Modern Award so far as the entitlements of Mr Becherelli were concerned when they reached agreement on the weekly salary to be paid to Mr Becherelli. It follows that notwithstanding the 'above award' weekly salary paid to Mr Becherelli, his entitlements as to overtime and penalty rates will be as provided by the terms of the Modern Award (without reference to cl 28 of the Modern Award).

11 For completeness, I note that cl 7 (Award flexibility) of the Modern Award enables an employer and an employee to agree to vary the application of terms of the award concerning overtime and penalty rates. However, that clause requires certain conditions to be satisfied and it is sufficient to note that the conditions set out in cl 7.4 of the Modern Award (agreement signed by each party etc.) have not been proven by the Company.

Second Issue: Allegations of Incompetence and Discreditable Behaviour

12 Salvatore Lucioli gave evidence of his extensive experience as an executive chef and in the management of restaurants, including of periods when he had directly supervised a large number of pastry cooks. Salvatore Lucioli detailed what he perceived as Mr Becherelli's failings in his role as a pastry chef during the period he worked at *Lucioli*: Mr Becherelli lacked

the interpersonal skills necessary to perform his duties; Mr Becherelli did not follow recipes supplied to him; Mr Becherelli did not properly manage stock with the result that stock was wasted; customers complained about the quality of items prepared by Mr Becherelli; Mr Becherelli was inefficient, taking more time than necessary with tasks and spending too much time 'on the mobile phone'. Luca Lucioli gave similar evidence, adding that Mr Becherelli had contacted employees of the Company and encouraged then to make claims against it.

13 Mr Becherelli denied each of the above allegations.

14 This issue can be addressed briefly. The Company did not adduce a single piece of *independent* evidence to support the serious imputations against the professional and personal character of Mr Becherelli. Salvatore Lucioli confirmed in cross-examination that he had not, at the time, conveyed to Mr Becherelli any customer complaints. The allegations are not proven. In any event, the provisions of the Modern Award (e.g. cl 9 on Dispute Resolution) and the FWA for dealing with such allegations do not countenance an employer raising such allegations in answer to an employee's claim to entitlements under the Modern Award to overtime and penalty rates.

Third Issue: Mr Becherelli Entitlements Under the Modern Award

Hours Worked by Mr Becherelli

15 The evidence of Mr Becherelli was that a spreadsheet prepared by him (and admitted into evidence as exhibit D) listing his starting time and finishing time for each day that he worked between 24 November 2014 and 20 March 2015 was an accurate reflection of his working hours. He said that it was based on time sheets filled out by him each day at the Company premises (and admitted into evidence as exhibit C) save for an initial period when the Company did not supply time sheets. The Company did not cross-examine on the accuracy of Mr Becherelli's transposition of the time sheets to his spreadsheet and, save as to question him about his taking 'breaks', did not question him about the accuracy of time sheets. There is no other evidence to suggest that the time sheets are not reliable records. In those circumstances, I am satisfied as to the accuracy of the spreadsheet as to the dates, starting times and finishing times of the work done by Mr Becherelli for the Company. The significance of the spreadsheet not referring to 'breaks' is discussed below at paragraph 21.

Appropriate Classification of Mr Becherelli Under the Modern Award

16 The rate of pay to which Mr Becherelli is entitled under the Modern Award depends upon his classification as defined in Schedule B for the area in which he is working. Mr Becherelli submits that the appropriate classification appears in 'Clause B.3.8 Cook grade 5'. The minimum hourly wage in the period November 2014-March 2015 for this classification was $21.43. (I note that some of the calculations of Mr Becherelli refer to a minimum hourly wage of $20.87 which would equate to a Cook grade 4 e.g. Attachment G). The Company submits that the appropriate classification appears in 'Clause B.3.6 Cook grade 3'. The minimum hourly wage in the period November 2014-March 2015 for this classification was $19.64. (I note that the calculations of the Company refer to a minimum hourly wage of $20.61 which is the *current* rate for a Cook grade 3 and not the rate during the relevant period.)

17 The relevant classifications in Schedule B of the Modern Award are as follows:

> ***B.3.6*** ***Cook grade 3 (tradesperson)*** *means a commi chef or equivalent who has completed an apprenticeship or who has passed the appropriate trade test or who has the appropriate level of training, and who is engaged in cooking, baking, pastry cooking or butchering duties.*
>
> ***B.3.7*** ***Cook grade 4 (tradesperson)*** *means a demi chef or equivalent who has completed an apprenticeship or who has passed the appropriate trade test or who has the appropriate level of training and who is engaged to perform general or specialised cooking, butchering, baking or pastry cooking duties and/or supervises and trains other cooks and kitchen employees.*
>
> ***B.3.8*** ***Cook grade 5 (tradesperson)*** *means a chef de partie or equivalent who has completed an apprenticeship or has passed the appropriate trade test or who has the appropriate level of training in cooking, butchering or pastry cooking and who performs any of the following:*
>
> **(a)** *general and specialised duties including supervision or training of other kitchen staff;*
>
> **(b)** *ordering and stock control; and*
>
> **(c)** *solely responsible for other cooks and other kitchen employees in a single kitchen establishment.*

18 I am satisfied that Mr Becherelli was engaged by the Company to perform the duties of a pastry chef and was responsible for the production of pastry products necessary for the operation of *Lucioli*, a 100 seat licensed 'Bar/Patisserie' establishment open from 8.30 am until after 10.30 pm. He was subject to the overall direction of Salvatore Lucioli. However, on a day to day basis he had significant autonomy. Mr Becherelli was responsible for the supervision of staff in the pastry section including a more junior cook (Lucia Franceschetti) and, when he commenced employment, another cook (Antonio Zaccaria). Mr Becherelli had significant experience as a pastry chef before he commenced working for the Company. He also had a number of professional qualifications. The findings in this paragraph are supported by the evidence of Mr Becherelli, Salvatore Lucioli and Luca Lucioli.

19 The fact that the duties of Mr Becherelli involved the supervision of staff satisfies me that the classification of Mr Becherelli should be as either a Cook Grade 4 or a Cook Grade 5. Reflecting on oft quoted statements to the effect that awards should be construed with an eye to the context of the relevant industry rather than legal niceties (e.g. ***Kucks v CSR Limited*** (1996) 66 IR 182), the overlapping descriptions in Grade 4 and Grade 5 is, in my view, resolved by accepting that the drafter intended, in any event, to establish a hierarchy of cooks. In this regard it is significant to me that Mr Becherelli was subject to the ultimate supervision of Salvatore Lucioli. In my view, this favours a classification of his duties as Cook Grade 4 with the result that the minimum hourly wage of $20.87 applied during the relevant period.

Calculation of Entitlements (Breaks, Overtime, Penalty Rates)

20 In Schedule III of this decision, I have prepared a table containing a breakdown of the hours worked each day by Mr Becherelli (see paragraph 15 above) with the detail necessary to calculate Mr Becherelli's entitlement under the Modern Award. The breakdown contains the following information:

- Hours worked Tuesday to Friday.
  - Before 7.00 am. Clause 34.2 of the Modern Award provides for an additional payment of 15% of the standard hourly rate for work between midnight and 7.00 am. This appears in Columns B, G, L, and Q.
  - The first 7.6 hours worked Tuesday to Friday. Clause 31.1 and cl 31.2 provide, in effect, for hours of work to average 38 per week and for eight full days off per four-week period. In the result, the 'ordinary' hours of work (i.e. hours before overtime becomes payable) is 7.6 hours per day. Columns C, H, M and R state the number of hours that, when added to the starting time that day (per Columns B, G, L, and Q), equate to 7.6.
  - The next two hours worked on Tuesday to Friday. This appears in Columns D, I, N and S. Clause 33.2 of the Modern Award provides that the overtime rate applicable to these hours is 150%.
  - The remaining hours worked Tuesday to Friday. This appears in Columns E, J, O and T. Clause 33.2 provides that the overtime rate applicable to these hours is 200%.
- Hours worked on Saturdays.
  - The first 7.6 hours worked Saturdays. This appears in Column V. Clause 34.1 of the Modern Award provides that the penalty rate applicable to these hours is 125%.
  - The next two hours worked Saturdays. This appears in Column W. Clause 33.2 provides that the overtime rate applicable to these hours is 175%.
  - The remaining hours worked Saturday. This appears in Column X. Clause 33.2 provides that the overtime rate applicable to these hours is 200%.
- Hours worked on Sundays.
  - The first 7.6 hours worked Sundays. This appears in Column Z. Clause 34.1 provides that the penalty rate applicable to the first 7.6 hours is 150%.
  - The remaining hours worked Sundays. This appears in Column AA. Clause 33.2 provides that the overtime rate applicable to these hours is 200%.

21 Mr Becherelli gave evidence of taking a 10 – 15-minute meal break on one occasion during each shift of work. This evidence was not contradicted and I am satisfied as to it being accurate. The effect of the Modern Award is that time taken on a break is ordinarily 'unpaid' and would not be counted for the purpose of calculating entitlements under the Modern Award, see cl 32.1. However, cl 32.4 of the Modern Award also details the entitlements of an employee who works more than five hours and is not given an unpaid meal break of at least 30 minutes. I do not accept the submission of Mr Becherelli that he is entitled to include the claim for the 10 – 15-minute meal break on the basis that he waives any claim to entitlements under cl 32 of the Modern Award in circumstances where he has shown it to be to the (arithmetic) advantage of the Company that he takes this approach. An employee may not 're-write' one clause of an award on the basis that the employee is waiving the benefit of another clause. It will be necessary to reduce the time claimed by Mr Becherelli by 15 minutes for each day that he worked which, on my calculations, equates to a reduction of $558.32 of his entitlement under the Modern Award. He worked: 84 days (Tuesday-Saturday) equating to 21 hours of 'breaks' at an award rate of $20.97 per hour ($440.37); 10 days (Sundays) equating to 2.5 hours of 'breaks' at an award rate of $41.94 ($104.85) and one day (public holiday) equating to 0.25 hours of a break at an award rate of $52.42 ($13.10). The sum of $440.37, $104.85 and $13.10 is $558.32.

Accounting for Above-Award Payments by the Company to Mr Becherelli

22 The weekly salary of $1,346.15 paid by the Company to Mr Becherelli for the duration of his employment equates to an hourly rate of $35.42 when calculated on the basis of a 38-hour week compared to the Modern Award minimum rate of pay of $20.87. The Company submits that any obligation with respect to overtime and penalty rates under the Modern Award must be reduced by the over-Award payments.

23 In ***Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate*** [2015] FCAFC 99, the Full Court of the Federal Court reviewed the law on this issue. The review included an assessment of the decision of the WA Industrial Appeal Court (Anderson, Scott and Parker JJ) in ***James Turner Roofing Pty Ltd v Peters*** [2003] WASCA 28. The judgment of North and Bromberg JJ place emphasis on the following passage of the judgement of Anderson J from ***James Turner Roofing***:

> *The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award. This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case* [45].

24 In ***Linkhill Pty Ltd*** the joint judgment proceed to state:

> *[W]hat is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment. ...* [98]

25 Applied to the facts of this case, the effect of the agreement between Mr Becherelli and the Company described by me at paragraph 9 above was that payments of the weekly salary of $1,346.15 discharged the obligation of the Company with respect to any entitlements under the Modern Award to 38 hours per week *and* a reasonable number of hours of overtime. It did not discharge the obligations of the Company to the entitlements of Mr Becherelli under the Award with respect to each hour of overtime worked by Mr Becherelli that was in excess of a reasonable number of hours. The evidence of Mr Becherelli (40 – 42 hours) and Salvatore Lucioli (45 – 50 hours), although not accepted as an accurate reflection of a conversation is revealing of their respective views on what constitutes a reasonable number of hours of overtime. It equates to overtime being payable after working between 8 – 10 hours. I note the evidence of Luca Lucioli to the effect that he considered one to two hours of overtime per day was 'reasonable'. My view is that one hour of overtime for each day worked is 'reasonable' in the context of the circumstances of this case which equates to overtime being payable after Mr Becherelli worked 8.6 hours.

26 Clause 33.3 of the Modern Award provides that 'overtime worked on any day stands alone'. The result is that for each day that Mr Becherelli worked in excess of 8.6 hours he is entitled to overtime at the rate calculated in accordance with the Modern Award. I have undertaken this calculation in Schedule III. Row 18 shows the total hours in excess of 7.6 hours for each work day. Row 19 shows a reduction of those hours for one hour of overtime each work day as explained above. Row 20 shows the relevant multiplier Rate. Row 21 is the product the number of hours from row 18 or 19 multiplied by the relevant multiplier rate. Row 22 is an addition for a public holiday. Row 23 is the total number of hours to which Mr Becherelli is entitled to be paid at the rate of $20.87. The result is an entitlement to $8,507.65.

Accounting for Other Matters: Cash Payments? Non-cash Benefits?

27 Salvatore Lucioli alleged that he made cash payments to Mr Becherelli on account of his employment. Luca Lucioli submitted that this should be taken into account. Mr Becherelli denied receiving any cash payments. The Company has failed to satisfy me that any cash payments were made to Mr Becherelli.

28 Salvatore Lucioli and Luca Lucioli gave evidence of Mr Becherelli having unrestricted access to food and drink supplied by the Company. Clause 27.2 of the Modern Award provides that the employer will pay wages by cash, cheque or electronic funds transfer. The supply of coffee did not discharge the obligation to pay wages under the Modern Award.

Accounting for Mr Becherelli's Failure to Give Notice of Termination

29 Mr Becherelli worked for the Company for 17 weeks. I am satisfied, on the basis of the payslips adduced by Mr Becherelli (exhibit A) and the payroll advice adduced by the Company (exhibit 1) that the Company paid to Mr Becherelli a salary of $1,346.15 for each of the 17 weeks that he worked for it. Clause 16 of the Modern Award, read with the FWA has the result that Mr Becherelli was required to give one weeks' notice of termination at the end of the 17 weeks. He admits that he did not do so. His entitlement under the Modern Award is accordingly reduced. Mr Becherelli's entitlement is reduced by one week's salary in the amount of $1,346.15.

Conclusion

30 I am satisfied that Mr Becherelli is entitled to $8,507.65 on account of unpaid overtime and penalty calculated in accordance with the Modern Award. This amount will be reduced by $558.32 on account of time taken for breaks (see paragraph 21) and $1,346.15 on account of failure to give notice of termination (see paragraph29), resulting in a judgment of $6,603.

31 I will hear from the parties on the question of interest. I note that s 547 of the FWA provides that on making an order for payment of an amount that was required under a modern award, then the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

M. FLYNN

INDUSTRIAL MAGISTRATE

Schedule I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA) under the *Fair Work Act 2009* (Cth): Small Claim Alleging Contravention of Modern Award

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.

[2] The Industrial Magistrates Court (WA) (IMC), being a court constituted by an industrial magistrate, is 'an eligible State or Territory court': FWA, s 12 (see definitions of 'eligible State or Territory court' and 'Magistrates Court'); Industrial Relations Act 1979 (WA), ss 81, 81B.

[3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA, s 544.

[4] The civil penalty provisions identified in s 539 of the FWA include the terms of a modern award where the award *applies* to give an entitlement to a claimant employee and to impose an obligation upon a respondent employer: FWA, s 45, s 46. The award *applies* if it *covers* the employee and the employer and there are no relevant statutory exceptions (e.g. high income employees e.g. $138,900 pa from 1 July 2016): FWA, s 47. The award *covers* the employee and the employer if it is expressed to cover the employee and the employer: FWA, s 48(1).

[5] An obligation upon an 'employer' covered by an award is an obligation upon a 'national system employer' and that term, relevantly, is defined to include 'a corporation to which paragraph 51(xx) of the Constitution applies': FWA, s 42, s 47, s 14, s 12. An entitlement of an employee covered by an award is an entitlement of an 'employee' who is a 'national system

employee' and that term, relevantly, is defined to include 'an individual so far as he or she is employed by a national system employer': FWA, s 42, s47, s 13.

[6] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for an *employer* to pay to an employee an amount that the employer was required to pay under the modern award: FWA, s 545(3)(a).

[7] Where the claimant elects to use the small claims procedure as provided for in section 548 of the FWA, the Court may not award more than $20,000 and may not make orders for any pecuniary penalty: FWA, s 548(1)(a), (2)(a).

Burden and standard of proof

[8] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[9] Where in this decision I state that 'I am satisfied' of a fact or matter I am saying that 'I am satisfied on the balance of probabilities' of that fact or matter. Where I state that 'I am not satisfied' of a fact or matter I am saying that 'I am not satisfied on the balance of probabilities' of that fact or matter.

Practice and Procedure of the Industrial Magistrates Court: Small Claim

[10] The FWA provides that 'in small claims proceedings, the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities: FWA, s 548(3). The significance of this provision was explained by Judge Lucev in *McShane v Image Bollards Pty Ltd* [2011] FMCA 215 at [7] in the following terms:

> *Although the Court is not bound by the rules of evidence, and may act informally, and without regard to legal forms and technicalities in small claim proceedings in the Fair Work Division, this does not relive an applicant from the necessity to prove their claim. The Court can only act on evidence having a rational probative force.*

[11] The IMC has experience of similar provisions. The *Industrial Relations Act 1979* (WA) (IRA) provides that, except as prescribed by or under the Act, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): IRA, s 81CA Relevantly, regulations prescribed under the IRA provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: Regulation 35(4). In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observations (omitting citations):

> *40* *... The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence.*
>
> *42* *... After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.*
>
> 43 *… The tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent opinion, for instance, upon oath, and whether the cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence and is authorised to act according to substantial justice and the merits of the case.*
>
> *44* *... An essential ingredient of procedural fairness is the opportunity of presenting one's case.*
>
> *45* *... the right to cross-examination is viewed as an important feature of procedural fairness.*
>
> *47* *... Procedural fairness requires fairness in the particular circumstances of the case. While a right to cross-examination is not necessarily to be recognised in every case as an incident of the obligation to accord procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.*

Schedule II

Restaurant Industry Award 2010

This Fair Work Commission consolidated modern award incorporates all amendments up to and including 12 November 2014 (PR557581)

Table of Contents

1. Title

This award is the *Restaurant Industry Award 2010*.

2. Commencement and transitional

[Varied by PR542239]

2.1 This award commences on 1 January 2010.

2.2 The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment.

2.3 This award contains transitional arrangements which specify when particular parts of the award come into effect. Some of the transitional arrangements are in clauses in the main part of the award. There are also transitional arrangements in Schedule A. The arrangements in Schedule A deal with:

- minimum wages and piecework rates
- casual or part-time loadings
- Saturday, Sunday, public holiday, evening or other penalties
- shift allowances/penalties.

[2.4 varied by PR542239 ppc 04Dec13]

2.4 Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, the Fair Work Commission may make any order it considers appropriate to remedy the situation.

[2.5 varied by PR542239 ppc 04Dec13]

2.5 The Fair Work Commission may review the transitional arrangements in this award and make a determination varying the award.

[2.6 varied by PR542239 ppc 04Dec13]

2.6 The Fair Work Commission may review the transitional arrangements:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) in relation to outworker arrangements, on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the arrangements relate.

3. Definitions and interpretation

[Varied by PR997772,PR503644,PR544294,PR546124]

3.1 In this award, unless the contrary intention appears:

Act means the *Fair Work Act 2009* (Cth)

[Definition of **adult apprentice** inserted by PR544294 ppc 01Jan14]

adult apprentice means an apprentice who is 21 years of age or over at the commencement of their apprenticeship

agreement-based transitional instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

appropriate level of training means that an employee:

(a) has completed an appropriate training program that meets the training and assessment requirements of a qualification or one or more designated units of competency from a Training Package;

(b) has been assessed by a qualified skills assessor to have skills at least equivalent to those attained in an appropriate training course; and/or

(c) at 31 December 2009 (except for a Food and beverage attendant grade 2 as defined in Schedule B—Classification Structure and Definitions) has been doing the work of a particular classification for a period of at least three months,

(however, to avoid doubt, the minimum classification rate for an employee who has completed AQF Certificate III or higher qualifications relevant to the classification in which they are employed is Level 4 in clause 20.1. For Food and beverage attendants grade 2, classification at grade 3 is subject to the employee having completed AQF Certificate II qualifications relevant to the grade 3 classification)

award-based transitional instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

catering by a restaurant business means the provision by a restaurant of catering services for any social or business function where such services are incidental to the major business of the restaurant

[Definition of **default fund employee** inserted by PR546124 ppc 01Jan14]

default fund employee means an employee who has no chosen fund within the meaning of the *Superannuation Guarantee (*Administration*) Act 1992* (Cth)

[Definition of **defined benefit member** inserted by PR546124 ppc 01Jan14]

defined benefit member has the meaning given by the *Superannuation Guarantee (Administration)* Act *1992* (Cth)

[Definition of **Division 2B State award** inserted by PR503644 ppc 01Jan11]

Division 2B State award has the meaning in Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

[Definition of **Division 2B State employment agreement** inserted by PR503644 ppc 01Jan11]

Division 2B State employment agreement has the meaning in Schedule 3A of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

[Definition of **employee** substituted by PR997772 from 01Jan10]

employee means national system employee within the meaning of the Act

[Definition of **employer** substituted by PR997772 from 01Jan10]

employer means national system employer within the meaning of the Act

enterprise award-based instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

[Definition of **exempt public sector superannuation scheme** inserted by PR546124 ppc 01Jan14]

exempt public sector superannuation scheme has the meaning given by the *Superannuation Industry (***Supervision***) Act 1993* (Cth)

[Definition of **MySuper product** inserted by PR546124 ppc 01Jan14]

MySuper product has the meaning given by the *Superannuation Industry (Supervision) Act 1993* (Cth)

NES means the National Employment Standards as contained in sections 59 to 131 of the *Fair Work Act 2009* (Cth)

on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client

relevant apprenticeship legislation means any awards and/or regulations made by any State Apprenticeship Authority

restaurant industry means restaurants, reception centres, night clubs, cafes and roadhouses, and includes any tea room, café, and catering by a restaurant business but does not include a restaurant operated in or in connection with premises owned or operated by employers covered by any of the following awards:

(a) *Hospitality Industry (General) Award 2010*;

(b) *Registered and Licensed Clubs Award 2010*; or

(c) *Fast Food Industry Award 2010*

spread of hours means the period of time elapsing from the time an employee commences duty to the time the employee ceases duty within any period of 24 hours

standard hourly rate means the minimum hourly wage for a Level 4 classification (Cook grade 3 (tradesperson)) in clause 20.1

standard rate means the minimum wage for a Level 4 classification (Cook grade 3 (tradesperson)) in clause 20.1

standard weekly rate means the minimum weekly wage for a Level 4 classification (Cook grade 3 (tradesperson)) in clause 20.1

transitional minimum wage instrument has the meaning in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

3.2 Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

4. Coverage

4.1 This industry award covers employers throughout Australia in the restaurant industry and their employees in the classifications listed in Schedule B—Classification Structure and Definitions to the exclusion of any other modern award.

4.2 The award does not cover an employee excluded from award coverage by the Act.

4.3 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

4.4 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

4.5 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

4.6 This award covers employers which provide group training services for apprentices and trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

4.8 This award does not cover employers in the following industries or activities or their employees:

(a) contract caterers whose principal and substantial business activity is that of providing catering services and/or accommodation services on a contract or fee-for-service basis;

(b) retail industry;

(c) fast food industry;

(d) in-flight catering for airlines;

(e) catering services provided by aged care employers;

(f) hotels, motels, hostels and boarding establishments;

(g) clubs registered or recognised under State or Territory legislation;

(h) boarding schools, residential colleges, hospitals or orphanages; or

(i) restaurants operated in or in connection with hotels, motels, hostels and boarding establishments, and/or clubs registered or recognised under State or Territory legislation.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

….

7. Award flexibility

[Varied by PR542239]

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

[7.2 varied by PR542239 ppc 04Dec13]

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress. An agreement under this clause can only be entered into after the individual employee has commenced employment with the employer.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1;and

[7.3(b) varied by PR542239 ppc 04Dec13]

(b) result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been agreed to.

7.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

7.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7.6 Except as provided in clause 7.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

7.8 The agreement may be terminated:

[7.8(a) varied by PR542239 ppc 04Dec13]

(a) by the employer or the individual employee giving 13 weeks 'notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

[Note inserted by PR542239 ppc 04Dec13]

Note: If any of the requirements of s.144(4), which are reflected in the requirements of this clause, are not met then the agreement may be terminated by either the employee or the employer, giving written notice of not more than 28 days (see s.145 of the *Fair Work Act 2009* (Cth)).

[New 7.9 inserted by PR542239 ppc 04Dec13]

7.9 The notice provisions in clause 7.8(a) only apply to an agreement entered into from the first full pay period commencing on or after 4 December 2013. An agreement entered into before that date may be terminated in accordance with clause 7.8(a),subject to four weeks 'notice of termination.

[7.9 renumbered as 7.10 by PR542239 ppc 04Dec13]

7.10 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

…

10. Types of employment

10.1 Employees under this award will be employed in one of the following categories:

(a) full-time;

(b) part-time; or

(c) casual.

10.2 At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be full-time, part-time or casual.

11. Full-time employment

A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

…

18. Work organisation

Employees must undertake duties as directed within the limits of their competence and may undertake duties across the different streams contained in the classification definitions in Schedule B—Classification Structure and Definitions.

19. Classifications

The definitions of the classification levels in clause 20—wages, are contained in Schedule B—Classification Structure and Definitions.

20. Minimum wages

[Varied by PR998019,PR509150,PR522981,PR536784,PR544294,PR551707]

20.1 General

[20.1 varied by PR998019,PR509150,PR522981,PR536784,PR551707 ppc 01Jul14]

An adult employee within a level specified in the following table (other than an apprentice) will be paid not less than the rate per week assigned to the classification, as defined in Schedule B—Classification Structure and Definitions, for the area in which such employee is working.

Classification	**Minimum weekly wage**	**Minimum hourly wage**
	$	**$**
Introductory level	640.90	16.87
Level 1:	659.40	17.35
Food and beverage attendant grade 1		
Kitchen attendant grade 1		
Level 2:	684.70	18.02
Food and beverage attendant grade 2		
Cook grade 1		
Kitchen attendant grade 2		
Clerical grade 1		
Storeperson grade 1		
Door person/security officer grade 1		
Level 3:	708.20	18.64
Food and beverage attendant grade 3		
Cook grade 2		
Kitchen attendant grade 3		
Clerical grade 2		
Storeperson grade 2		
Timekeeper/security officer grade 2		
Handyperson		
Level 4:	746.20	19.64
Food and beverage attendant grade 4 (tradesperson)		
Cook grade 3 (tradesperson)		
Clerical grade 3		
Storeperson grade 3		
Level 5:	793.00	20.87
Food and beverage supervisor		
Cook grade 4 (tradesperson)		
Clerical supervisor		
Level 6:	814.20	21.43
Cook grade 5 (tradesperson)		

27. Payment of wages

27.1 Except upon the termination of employment, all wages including overtime must be paid on any day other than Friday, Saturday or Sunday in each week. However, by agreement between the employer and the majority of employees in the workplace, in a week where a holiday occurs payment of wages may be made on Friday.

27.2 The employer will pay the employee's wages, penalties and allowances weekly, fortnightly or, by agreement, monthly by cash, cheque or by electronic funds transfer into the employee's nominated bank account, without cost to the employee.

27.3 Employees whose rostered day off falls on pay day must be paid their wages, if they so desire, before going off duty on the working day prior to their day off. Provided that this provision will not apply to employees paid by electronic funds transfer.

27.4 When notice of termination of employment has been given by an employee or an employee's services have been terminated by an employer, payment of all wages due must be made during working time, prior to the employee leaving their employment.

27.5 Where an employee is dismissed for misconduct the employee must be paid within one hour of their dismissal or as soon as practicable thereafter.

28. Annualised salary arrangements

28.1 Alternative method of payment—annual salary

(a) As an alternative to being paid by the week, by agreement between the employer and an individual employee, an employee other than a casual, can be paid at a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20—Minimum wages, multiplied by 52 for the work being performed. In such cases, there is no requirement under clauses 24.2,33—Overtime,34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

(b) Provided further that in the event of termination of employment prior to completion of a year, the salary paid during such period of employment must be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.

(c) An employee being paid according to this clause will be entitled to a minimum of eight days off per four-week cycle. Further, if an employee covered by this clause is required to work on a public holiday, such employee will be entitled to a day off instead of public holidays or a day added to the annual leave entitlement.

28.2 The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. This is to enable the employer to carry out a reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.

31. Hours of work

31.1 The hours of work of a full-time employee are an average of 38 per week over a period of no more than four weeks.

31.2 The arrangement of ordinary hours must meet the following conditions:

(a) a minimum of six hours and a maximum of 11 and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break intervals;

(b) an employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours;

(c) no more than eight days of more than 10 hours may be worked in a four-week period;

(d) an employee must be given a minimum break of 10 hours between the finish of ordinary hours of work on one day and the commencement of ordinary hours of work on the next day. In the case of a changeover of rosters the minimum break must be eight hours;

(e) an employee must be given a minimum of eight full days off per four-week period; or

(f) an employee under the age of 18 years must not be required to work more than 10 hours in a shift.

31.3 Make-up time means an arrangement under which an employee takes time off during the employee's ordinary hours of work and makes up that time later. The employer and a majority of employees in a workplace may agree to introduce make-up time subject to the following conditions:

(a) subject to such agreement, an employee may elect, with the consent of the employer, to work make-up time;

(b) make-up time arrangements must comply with the conditions set out in clause 32—Breaks and clause 34—Penalty rates;

(c) the employer must record make-up time arrangements as time and wages records; and

(d) any disputes in relation to the practical application of this clause may be dealt with in accordance with clause 9—Dispute resolution.

31.4 Spread of hours

Where broken shifts are worked the spread of hours can be no greater than 12 hours per day.

31.5 Minimum break between shift

The roster for all employees other than casuals will provide for a minimum 10 hour break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day. In the case of changeover of rosters, eight hours will be substituted for 10 hours.

31.6 Roster

(a) A roster for full-time and part-time employees showing normal starting and finishing times and the surname and initials of each employee will be prepared by the employer and will be posted in a conspicuous place accessible to the employees concerned.

(b) The roster will be alterable by mutual consent at any time or by amendment of the roster on seven days 'notice. Where practicable, two weeks 'notice of rostered day or days off should be given provided that the days off may be changed by mutual consent or through sickness or other cause over which the employer has no control.

32. Breaks

32.1 If an employee, including a casual employee, is required to work for five or more hours in a day the employee must be given an unpaid meal break of no less than 30 minutes. The break must be given no earlier than one hour after starting work and no later than six hours after starting work.

32.2 If the unpaid meal break is rostered to be taken after five hours of starting work, the employee must be given an additional 20 minute paid meal break. The employer must allow the employee to take this additional meal break no earlier than two hours after starting work and no later than five hours after starting work.

32.3 If an employee is not given the unpaid meal break at the time the employer has told the employee it will be given; the employer must pay the employee 150% of the employee's ordinary base rate of pay from the time the meal break was to commence until either the meal break is given or the shift ends.

32.4 If clause 32.3 does not apply and an employee is not given a meal break in accordance with clause 32.1 the employer must pay the employee 150% of the employee's ordinary base rate of pay from the end of six hours until either the meal break is given or the shift ends.

32.5 If an employee is required to work more than five hours after the employee is given the unpaid meal break, the employee must be given an additional 20 minute paid break.

32.6 If a full-time or regular part-time employee is required to work more than 10 ordinary hours in the day, the employee will be given two additional 20 minute paid breaks. In rostering for these breaks, the employer must make all reasonable efforts to ensure an even mix of work time and breaks.

32.7 If an employee is required to work more than two hours' overtime after completion of the employee's rostered hours, the employee must be given an additional 20 minute paid break.

33. Overtime

33.1 Requirement to pay overtime rates

(a) Full-time and part-time employees are paid at overtime rates for any work done outside of the spread of hours or rostered hours set out in clause 31—Hours of work.

(b) In addition, part-time employees are paid at overtime rates in the circumstances specified in clause 12.7.

33.2 Overtime rates

The overtime rate payable to an employee depends on the time at which the overtime is worked.

(a) Monday to Friday:150% of the employee's ordinary base rate of pay for the first two hours of overtime then 200% of the employee's ordinary base rate of pay for the rest of the overtime.

(b) Between midnight Friday and midnight Saturday:175% of the employee's ordinary base rate of pay for the first two hours of overtime then 200% of the employee's ordinary base rate of pay for the rest of the overtime.

(c) Between midnight Saturday and midnight Sunday:200% of the employee's ordinary base rate of pay for all time worked.

(d) On a rostered day off:200% of the employee's ordinary base rate of pay for all time worked. The employee must be paid for at least four hours' even if the employee works for less than four hours.

33.3 Overtime worked on any day stands alone.

33.4 Breaks after working overtime

If starting work at the employee's next rostered starting time would mean that the employee did not receive a full eight-hour break, then:

(a) the employee may, without loss of pay, start work at such a later time as is necessary to ensure that the employee receives a break of at least eight hours; or

(b) the employer must pay the employee overtime rates for all work performed until the employee has received a break of at least eight hours.

33.5 Time off instead of payment for overtime

(a) Despite clause 33.1 an employee may choose, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer. This agreement must be in writing. The employee must take the time off within four weeks of working the overtime.

(b) If an employee takes time off instead of payment for overtime then the amount of time off is to be equivalent to the pay the employee would have otherwise received for working the overtime.

(c) If requested by an employee an employer must, within one week of receiving a request, pay the employee for any overtime worked. The employee must be paid at overtime rates.

34. Penalty rates

[Varied by PR543062,PR551382]

34.1 Penalty rates for work on weekends and public holidays

[34.1 substituted by PR551382 pcc 01Jul14]

An employee working ordinary time hours on the following days will be paid the following percentage of the minimum wage in clause 20—Minimum wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	150	250
Casual Introductory Level,	125	150	150	250
Level 1, Level 2				
(inclusive of 25% casual loading)				
Casual Level 3 to Level 6	125	150	175	250
(inclusive of casual 25% loading)				

34.1A Special condition regarding existing employees

No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.

34.2 Additional payment for work done between the hours of 10.00 pm to 7.00 am on Monday to Friday

(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours of 10.00 pm and midnight Monday to Friday inclusive, or between midnight and 7.00 am Monday to Friday inclusive, must be paid an additional amount per hour calculated according to the following:

(i) Between 10.00 pm and midnight

- For each hour or part of an hour worked during such times—10% of the standard hourly rate per hour extra.

(ii) Between midnight and 7.00 am

- For each hour or part of an hour worked during such times—15% of the standard hourly rate per hour extra.

(b) For the purposes of this clause midnight will include midnight Sunday.

34.3 Penalty rates not cumulative

Except as provided in clause 32—Breaks, where time worked is required to be paid at more than the ordinary rate such time will not be subject to more than one penalty, but will be subjected to that penalty which is to the employee's greatest advantage.

34.4 Additional provisions for work on public holidays

(a) An employee other than a casual working on a public holiday must be paid for a minimum of four hours' work.

(b) A casual employee working on a public holiday must be paid for a minimum of two hours' work.

(c) Employees who work on a prescribed holiday may, by agreement, perform such work at a rate of 150% of the relevant minimum wage in clause 20—Minimum wages, rather than the penalty rate prescribed in clause 34.1,provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided further that such holiday may be allowed to the employee within 28 days of such holiday falling due.

[34.4(d) varied by PR543062 ppc 10Oct13]

(d) An employee other than a casual working on Christmas Day when it falls on a weekend and it is not a prescribed public holiday must be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.

…

Schedule B—Classification Structure and Definitions

[Schedule B varied by PR508273,PR551382]

B.3 Kitchen

B.3.1 Kitchen attendant grade 1 means an employee engaged in any of the following:

(a) general cleaning duties within a kitchen or food preparation area and scullery, including the cleaning of cooking and general utensils used in a kitchen and restaurant;

(b) assisting employees who are cooking;

(c) assembly and preparation of ingredients for cooking; and

(d) general pantry duties.

B.3.2 Kitchen attendant grade 2 means an employee who has the appropriate level of training, and who is engaged in specialised non-cooking duties in a kitchen or food preparation area, or supervision of kitchen attendants.

B.3.3 Kitchen attendant grade 3 means an employee who has the appropriate level of training including a supervisory course, and has the responsibility for the supervision, training and co-ordination of kitchen attendants of a lower grade.

B.3.4 Cook grade 1 means an employee who carries out cooking of breakfasts and snacks, baking, pastry cooking or butchering.

B.3.5 Cook grade 2 means an employee who has the appropriate level of training and who performs cooking duties such as baking, pastry cooking or butchering.

B.3.6 Cook grade 3 (tradesperson) means a commi chef or equivalent who has completed an apprenticeship or who has passed the appropriate trade test or who has the appropriate level of training, and who is engaged in cooking, baking, pastry cooking or butchering duties.

B.3.7 Cook grade 4 (tradesperson) means a demi chef or equivalent who has completed an apprenticeship or who has passed the appropriate trade test or who has the appropriate level of training and who is engaged to perform general or specialised cooking, butchering, baking or pastry cooking duties and/or supervises and trains other cooks and kitchen employees.

B.3.8 Cook grade 5 (tradesperson) means a chef de partie or equivalent who has completed an apprenticeship or has passed the appropriate trade test or who has the appropriate level of training in cooking, butchering or pastry cooking and who performs any of the following:

(a) general and specialised duties including supervision or training of other kitchen staff;

(b) ordering and stock control; and

(c) solely responsible for other cooks and other kitchen employees in a single kitchen establishment.

Schedule III Table of Calculations in M 47/2016

		Tue	Tue	Tue	Tue		Wed	Wed	Wed	Wed		Thur	Thur	Thur	Thur		Fri	Fri	Fri	Fri		Sat	Sat	Sat	Sun	Sun	Total
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		Q	R	S	T		V	W	X	Z	AA	BB
1	25/11–30/11	2	5.6	2	1.4		2	5.6	2	4		2	5.6	2	.4		2	5.6	2	2.4		7.6	2	2.4	7.6	5.4	
2	2/12-7/12	2	5.6	2	2.9		2	5.6	2	1.4		2	5.6	2	2.9		2	5.6	2	2.65		7.6	2	2.9	7.6	6.65	
3	9/12-14/12	1	6.6	2	0.15		2	5.6	2	1.4		2	5.6	2	2.9		2	5.6	2	1.95		7.6	2	1.23	7.6	2.9	
4	16/12-21/12	2	5.6	2	2.15		2	5.6	2	1.73		1.66	5.94	2	2.81		2	5.6	2	2.73		7.6	2	2.4	7.6	2.06	
5	23/12-28/12	1.83	5.77	2	3.23		2.33	3.27	2	0.4		0	0	0	0		0	0	0	0		7.6	2	2.7	7.6	2.7	
6	30/12-4/1	2	5.6	2	1.4	-	2	5.6	2	1.06		0	0	0	0		2	5.6	2	1.65		7.6	2	1.9	7.6	.9	
7	6/1-11/1	1.75	5.85	2	0.65		2	5.6	2	1.23		2	7.6	2	1.65		1.66	5.94	2	.9		7.6	2	1.65	7.6	2.4	
8	3/1-18/1	2	5.6	2	0		2	5.6	2	0.9		1.5	6.1	2	1.4		1.5	6.1	2	2.4		7.6	2	1.65	7.6	1.66	
9	20/1-25/1	1.66	5.94	1.73	0		1.75	5.85	2	0.81		2	5.6	2	1.4		1.75	5.85	2	.4		7.6	2	1.73	7.6	.9	
10	29/1-1/2	2	5.6	1.4	0		1.66	5.94	2	2.73		2.66	5.27	2	1.23		2	5.6	2	0.4		7.6	1.9	0	7.6	1.4	
11	3/2-8/2	1.75	5.85	2	.4		1	6.6	1.9	0		1.83	5.77	2	2.25		2	5.6	2	2.9		7.6	2	0.56	0	0	
12	19/2-14/2	1	6.6	2	3.73		1.5	6.1	2	2.06		1.66	5.94	2	3.4		2	5.6	2	4.06		7.6	2	1.15	0	0	
13	17/2-21/2	2	5.6	2	1.73		2	5.6	2	2.4		1.66	5.94	2	3.9		1.66	5.94	2	0.56		7.6	2	0.4	0	0	
14	24/2-28/2	1.5	6.1	2	0.56		1.5	5.6	1.9	0		2	5.6	2	1.15		1.66	5.94	2	1.73		7.6	2	0.9	0	0	
15	3/3-7/3	2.75	4.85	2	0.56		2.66	4.94	2	3.4		3	4.6	2	2.9		3.75	3.85	2	0.31		7.6	1.48	0	0	0	
16	10/3-14/3	1.5	6.1	2	0.15		2.56	5.6	2	4		5	2.6	1.23	0		2	5.6	1.7	0		7.6	2	.4	0	0	
17	17/3-20/3	1.75	5.85	1.38	0		3.5	4.1	1.06	0		1.5	6.1	2	1.4		1.66	1.66	0	0		0	0	0	0	0	
18	Total hours			32.51	19.01				32.86	27.52				29.23	29.69				29.7	25.04			31.38	21.97		26.97	
19	Reduced 1hr OT			15.51					15.86					14.23					14.7				15.38			19.97	
20	Rate			1.5	2				1.5	2				1.5	2				1.5	2			1.75	2		2	
21	Overtime			23.26	38.02				23.79	55.04				21.34	59.38				22.05	50.08			26.91	43.94		39.94	403.75
22	Public Hol																										3.9
23	Total Hrs																										407.65
24	@ $20.87																										8507.65

Note: In addition, 26/12/14 was a Public Holiday and AB worked 12.5 hours. Clause 34.1 provides for a rate of 250% for those hours. 12.5 minus 7.6 = 4.9 hours overtime, reduced by one hour = 3.9 hours at 250%.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2017 WAIRC 00044

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN BOOTH
	APPLICANT
	-v-
	DAS FURNITURE PRODUCTS
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	TUESDAY, 31 JANUARY 2017
FILE NO/S	U 202 OF 2013
CITATION NO.	2017 WAIRC 00044

Result Application dismissed

Order

WHEREAS this is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* filed on 12 December 2013; and

WHEREAS the Commission convened conferences for the purpose of conciliating between the parties on 15 January 2014, 5 February 2014 and 19 March 2014; and

WHEREAS at the conference on 19 March 2014, the parties reached in-principle agreement to settle the applicant's claim; and

WHEREAS by letter dated 20 March 2014, the Commission wrote to the parties to confirm the terms of the parties' in-principle agreement; and

WHEREAS on 23 April 2014, 20 June 2014, 30 June 2014 by telephone, the applicant confirmed the parties' agreement but noted that the respondent was not making payments in accordance with the agreed schedule; and

WHEREAS on 23 April 2014 by telephone, the respondent acknowledged the agreement and said he did not have the funds to meet the payment schedule; and

WHEREAS on 30 June 2014, the applicant wrote to the Commission in the same terms as his earlier telephone calls; and

WHEREAS on 23 February 2015 and 4 March 2015, the applicant's lawyer requested, by telephone, that the Commission issue an order reflecting the parties' agreement; and

WHEREAS on 11 November 2015, the Commission wrote to the parties requesting that they provide a status update; and

WHEREAS by email on 3 December 2015, the applicant informed the Commission that the respondent had not complied with the parties' agreement; and

WHEREAS on 6 December 2015, the respondent wrote to the Commission indicating it will pay the applicant if and when funds become available; and

WHEREAS, following a series of emails from the applicant requesting advice in relation to enforcement of the agreement, by letter dated 16 January 2016, the Commission noted the parties' agreement and indicated an intention to list the matter for a directions hearing to determine how the application may be dealt with; and

WHEREAS at the directions hearing on 2 March 2016, the respondent informed the Commission that he is insolvent and unable to meet the applicant's claim, and undertook to have his accountant write to the applicant to confirm this; and

WHEREAS on 18 March 2016, the respondent's accountant confirmed that the respondent is insolvent and that the official process in relation to his insolvency will commence in April 2016; and

WHEREAS on 2 June 2016, the Commission listed the matter for mention on 13 June 2016; and

WHEREAS at the for mention hearing, there was no appearance for or on behalf of the applicant; and

WHEREAS by letter dated 13 June 2016, the Commission asked the applicant to indicate his intentions regarding the application by no later than 27 June 2016; and

WHEREAS by email on 27 June 2016, the applicant responded to the Commission's letter of 13 June 2016 but did not directly clarify his intentions with respect to the application; and

WHEREAS by email on 7 September 2016, the respondent confirmed that the trustee in insolvency had been appointed; and

WHEREAS by email on 1 December 2016, the respondent confirmed that he had been declared bankrupt; and

WHEREAS by email on 6 January 2017, the Commission noted the respondent's bankruptcy status and asked the applicant to advise whether he believes the matter should remain alive, and if so, what practical purpose is served by the application remaining alive in light of the respondent's status, whether the applicant intends to pursue the application, and that he should advise the Commission by Friday, 21 January 2017, and that if he did not do so, an order would issue dismissing the application; and

WHEREAS as of 31 January 2017, the Commission has received no further correspondence from the applicant.

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.] Chief Commissioner.

2017 WAIRC 00009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00009
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	WEDNESDAY, 21 DECEMBER 2016 THURSDAY, 22 DECEMBER 2016
DELIVERED	**:**	THURSDAY, 5 JANUARY 2017
FILE NO.	**:**	B 159 OF 2016
BETWEEN	**:**	DENNIS BUCKLE Claimant AND SPOTLESS GROUP Respondent

CatchWords	**:**	Claim for redundancy payment pursuant to contract - Claim disputed - Respondent argues no redundancy policy exists therefore contracual term referring thereto void for uncertainty - Held clause not uncertain - Principles applied - Contract intended claimant receive redundancy payment upon termination - Quantum of claim amount unchallenged - Payment ordered
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Result	**:**	Claim allowed; payment ordered
Representation:		
Claimant	**:**	In person
Respondent	**:**	Ms H Millar (of Counsel)
Solicitors:		
Respondent	**:**	Herbert Smith Freehills

Case(s) referred to in reasons:

Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd (2011) 274 ALR 731

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

Case(s) also cited:

Compass Group (Australia) Pty Ltd v National Union of Workers (2015) 253 IR 32

National Union of Workers v Compass Group (Australia) Pty Ltd [2015] FWC 6055

Termination, Change and Redundancy Case (1984) 8 IR 34 and (1984) 9 IR 115

Reasons for Decision

1 This matter was heard at the same time as B 138 of 2016 and B 142 of 2016.

2 The claimant gave evidence on his own behalf and the respondent called Peter Noel Woods, its commercial manager for laundries in Western Australia, and Matthew Potter, its national human resources manager.

3 The claimant says that he has an entitlement to a payment under the clause in his contract of employment titled "Redundancy". The contract of employment is Exhibit 1 in these proceedings. The relevant part of that clause provides as follows:

> If your employment is terminated on the grounds of redundancy, retrenchment benefits payable to you will accord with the terms of the retrenchment policy applicable to Spotless staff at that time. The total payment (including severance payment and notice or payment in lieu) shall not exceed an amount equal to 52 weeks [Fixed Annual Remuneration].

4 It is not in dispute that the claimant's employment was terminated on the grounds of redundancy.

5 The respondent's defence is set out at [9] to [11] of its outline of submissions as follows:

> 9. Mr Buckle's contract of employment does not contain any express redundancy provisions and includes no reference to the OCTL Exception. Rather, Mr Buckle's employment contract states at page 3 that "retrenchment benefits payable to you will accord with the terms of the retrenchment policy applicable to Spotless Staff at that time."
>
> 10. The Respondent's National Human Resources Management, Mr Matthew Potter will give evidence that Spotless in June 2016 did not, and that it still does not, have a retrenchment or redundancy policy. Further, Mr Potter's evidence will be that Spotless is not aware of, and has not been able to identify, any retrenchment or redundancy policy that existed at the time Mr Buckle was employed, or has existed thereafter.
>
> 11. In the absence of any policy creating an entitlement to redundancy pay, and in circumstances in which Mr Buckle's employment contract is otherwise silent on redundancy entitlements, Mr Buckle cannot demonstrate a contractual entitlement to redundancy pay. Accordingly, the Respondent submits that Mr Buckle has no contractual entitlement to redundancy pay.

6 Mr Potter's evidence was as [10] of the outline of submissions said it would be.

7 The respondent's defence is that in the absence of a retrenchment policy, the clause is uncertain and, for that reason, void.

8 I do not find the clause to be uncertain.

9 The clause clearly contemplates that if the claimant's employment is terminated on the grounds of redundancy a payment will be made to the claimant. This is the only conclusion open given the use of the word "payable" in the first sentence and the cap on the "total payment" provided for by the second sentence.

10 It was the intention of the parties to the contract that the claimant, if his employment was terminated for redundancy, would receive a payment.

11 If the circumstances permit I must apply objective standards of reasonableness to prevent the intention of the parties being defeated (see *Australian Securities and Investments Commission (ASIC) v Fortescue Metals Group Ltd* (2011) 274 ALR 731, [122] – [123] per Keane CJ).

12 Where there is a readily ascertainable external standard which is proved, I should have regard to it to add flesh to a provision which on its face is apparently uncertain or illusory (see *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 136 per Kirby P).

13 Where a promise to pay money appears illusory or uncertain because there is no agreed basis for calculation of the payment, I should strain to find criteria, at least for the minimum performance required of the party promising to make a payment, and I should, if I can, enforce that promise (*Biotechnology* at 144 per Hope JA).

14 Against the background of the principles emerging from the decided cases this matter is capable of simple resolution.

15 In terms of the payment to be made to an employee of a corporation like the respondent, where the employment ends for redundancy, there is a readily ascertainable external standard, namely the National Employment Standard, found in s 119(2) of the *Fair Work Act 2009* (Cth). The respondent could not have had a policy which provided for anything less than what is provided for by the National Employment Standard. Finding the criterion for the minimum performance required of the respondent could not be simpler. It may be found in the National Employment Standard.

16 The above is sufficient to determine the outcome of the matter but closer consideration of the decision in *Biotechnology* is instructive.

17 In that case the respondent entered into a contract of employment which provided that he would have the option to participate in the appellant's "senior staff equity sharing scheme". The respondent knew that no such scheme had been established when he was employed and no such scheme had been established when his employment was terminated. The respondent sought damages for what he claimed to be an unpaid component of his contract of employment.

18 By majority, the New South Wales Court of Appeal, reluctantly if the judgments of Kirby P and McHugh JA are read, came to the conclusion that there was no external standard which could be applied to fix an appropriate or reasonable scheme (see Kirby P at 139; McHugh JA at 156).

19 It is clear that had there been such an external standard known or proved, the majority would have applied it.

20 This case has some similarity to *Biotechnology*. In *Biotechnology* there was no scheme, here there was no retrenchment policy. However, unlike in *Biotechnology*, in this case the identification of an external standard is possible, indeed easy, and its application simple.

21 The issue of whether the claimant's redundancy arose as a result of the ordinary and customary turnover of labour is not relevant to his claim. That exception to a redundancy payment was not part of his contract of employment. His contract of employment provided that he would receive a payment of some sort if made redundant. I have determined the external standard for calculation of the amount.

22 That other contracts between the respondent and its employees include the exception or that the respondent would not ordinarily (that is without a contractual entitlement) make a redundancy payment to an employee in the claimant's circumstances or that the *Fair Work Act 2009* (Cth) provides for circumstances in which the redundancy payment provisions under that Act would not apply to the claimant are all beside the point. The claimant had a **contractual** entitlement to a redundancy payment and I have been able to identify an external standard for the reasonable and appropriate calculation of the quantum.

23 The claimant claims 11 weeks of pay at his "Fixed Annual Remuneration" rate as at the date of termination. No issue was taken with the quantum and it is the amount found in the National Employment Standard. I will make an order in those terms.

2017 WAIRC 00024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DENNIS BUCKLE
	CLAIMANT
	-v-
	SPOTLESS GROUP
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 16 JANUARY 2017
FILE NO/S	B 159 OF 2016
CITATION NO.	2017 WAIRC 00024

Result	Claim allowed; payment ordered
Representation	
Claimant	In person
Respondent	Ms H Millar (of Counsel)

Order

HAVING heard the claimant on his own behalf and Ms H Millar, of Counsel, for the respondent on 21 and 22 December 2016; and

HAVING given Reasons for Decision in which I determined to allow the claim;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* make the following order:

> THAT the respondent forthwith pay to the claimant the sum 11 weeks of pay at the claimant's Fixed Annual Remuneration rate as at the date of his termination.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2017 WAIRC 00029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARCO CELENZA
	APPLICANT
	-v-
	SONIA & TIM FAIRHEAD DIRECTORS AND LICENSEE, NORFOLK COMMERCIAL
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 19 JANUARY 2017
FILE NO/S	B 40 OF 2016
CITATION NO.	2017 WAIRC 00029

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr T O'Leary (of counsel)

Order

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

AND WHEREAS on 19 May 2016, 4 October 2016 and 16 November 2016 the Commission convened conferences between the parties;

AND WHEREAS on 14 December 2016 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby order –

THAT this application be and is hereby dismissed.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00036

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEAL SCOT GIBSON
	APPLICANT
	-v-
	CHARLES POSSELT
	OZ ECO ENGERGY PTY LTD (ABN 98 609 750 898)
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 23 JANUARY 2017
FILE NO/S	B 156 OF 2016
CITATION NO.	2017 WAIRC 00036

Result	Name of respondent amended
Representation	
Applicant	In person
Respondent	Mr C Posselt

Order

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

AND WHEREAS at the hearing on 23 January 2017 the parties agreed to the name of the respondent being amended;

AND WHEREAS the Commission is of the opinion that it is appropriate to amend the name of the respondent;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent be amended to 'Oz Eco Energy Pty Ltd'.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00037

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NEAL SCOT GIBSON
	APPLICANT
	-v-
	OZ ECO ENERGY PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 23 JANUARY 2017
FILE NO/S	B 156 OF 2016
CITATION NO.	2017 WAIRC 00037

Result	Order reflecting agreement reached
Representation	
Applicant	In person
Respondent	Mr C Posselt

Order

WHEREAS the applicant has claimed that he was denied contractual benefits by the respondent;

AND WHEREAS at a conference in this matter held pursuant to s 32 of the *Industrial Relations Act 1979* (WA) the parties confirmed they had reached an agreement that in consideration of the applicant returning the respondent's telephone and tablet by 27 January 2017 and withdrawing this claim, the respondent will pay the applicant the sum agreed;

AND WHEREAS both the applicant and the respondent agreed that the terms of their agreement are to be reflected in an order of the Commission;

NOW THEREFORE I, the undersigned, hereby make the following order by consent –

1. The respondent pay the applicant $2,500 by 14 February 2017.
2. The respondent pay the applicant $2,297.65 by 16 March 2017.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2017 WAIRC 00040

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIANA TARRANT
	APPLICANT
	-v-
	ROBERT A MILLER TRADING AS FRIENDLIES CHEMIST CAROUSEL (CAROUSEL PHARMACY)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 30 JANUARY 2017
FILE NO/S	U 170 OF 2016
CITATION NO.	2017 WAIRC 00040

Result	Application dismissed

Order

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

WHEREAS on 8 December 2016, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on 13 December 2016, the respondent advised the Commission that the parties had reached agreement to settle the matter; and

WHEREAS on 28 December 2016, the applicant confirmed that the parties had reached agreement to settle the matter; and

WHEREAS on 10 January 2017, the applicant filed a *Form 14 – Notice of withdrawal or 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 the application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2017 WAIRC 00068

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PERRY VITALE
	APPLICANT
	-v-
	RAHLE SALKOW - SIGNARAMA OSBORNE PARK
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 10 FEBRUARY 2017
FILE NO/S	B 174 OF 2016
CITATION NO.	2017 WAIRC 00068

Result	Application dismissed
Representation	
Applicant	Mr P Vitale in person
Respondent	Ms P Dunphy as agent

Order

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

WHEREAS on Wednesday, 9 December 2016, the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conference, the parties reached agreement in full and final settlement of the dispute; and

WHEREAS on Friday, 10 February 2017, the Commission listed the application for mention to ascertain its status; and

WHEREAS at the hearing, the Commission read into the record the reasons for listing the matter for mention; and

WHEREAS at the hearing, the parties reached agreement on the final sum due to the applicant, and agreed to the Commission issuing orders in the following terms to reflect the parties' agreement.

NOW THEREFORE, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979*, and by consent, hereby orders:

1. THAT the respondent pay to the applicant the net amount of $154.92.
2. THAT payment is to be made no later than Friday, 17 February 2017.
3. THAT the respondent provide to the applicant a Group Certificate by 15 April 2017.
4. THAT the application be, and is otherwise hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Chief Commissioner.

2017 WAIRC 00027

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VANESSA WILLIAMS
	APPLICANT
	-v-
	MS MARGARET STEVENS T/AS BASE BASICS WA AND MS BOOKKEEPING
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 16 JANUARY 2017
FILE NO/S	B 134 OF 2016
CITATION NO.	2017 WAIRC 00027

Result	Order reflecting agreement reached
Representation	
Applicant	Ms M Mills (as agent)
Respondent	Ms M Stevens

Order

WHEREAS the applicant has claimed that she was denied contractual benefits by the respondent from October 2015 to June 2016;

AND WHEREAS at a conference in this matter held pursuant to s 32 of the *Industrial Relations Act 1979* (WA) an agreement was reached between the parties that in consideration of the applicant withdrawing this claim, and in full and final settlement of all matters arising from the applicant's employment, the respondent will pay the sum agreed;

AND WHEREAS both the applicant and the respondent agreed that the terms of their agreement are to be reflected in an order of the Commission;

NOW THEREFORE I, the undersigned, hereby make the following order by consent –

The respondent pay the applicant a total of $9,232.77 in accordance with the following:

1. $1,000 on 1 February 2017.
2. $1,000 on 1 March 2017.
3. $1,000 on 1 April 2017.
4. $1,000 on 1 May 2017.
5. $1,000 on 1 June 2017.
6. $1,000 on 1 July 2017.
7. $1,000 on 1 August 2017.
8. $1,000 on 1 September 2017.
9. $1,000 on 1 October 2017.
10. $232.77 on 1 November 2017.

The respondent agrees to endeavour to pay the applicant sooner than the dates above.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Juan Diego Ariza Moreno	Omar Aragon T/A Omar's Garden Commercial and Domestic Cleaning Service	U 85/2016	Commissioner D J Matthews	Discontinued
Stelio Emanuell Miles	(G Lancaster & M Markey) Trading as Gascoyne Hotel	U 133/2016	Senior Commissioner S J Kenner	Discontinued
Wan-Yu Jenny Lin	Mandy Mason, Cognilab	U 128/2016	Senior Commissioner S J Kenner	Discontinued

CONFERENCES—Matters referred—

2017 WAIRC 00034

DISPUTE RE AN AGREEMENT MADE UNDER CLAUSE 24(14) OF THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00034
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	**:**	THURSDAY, 8 DECEMBER 2016; WEDNESDAY, 14 DECEMBER 2016
DELIVERED	**:**	FRIDAY, 20 JANUARY 2017
FILE NO.	**:**	PSACR 5 OF 2016
BETWEEN	**:**	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
		Applicant
		AND
		SOUTH METROPOLITAN HEALTH SERVICE, ESTABLISHED PURSUANT TO S 32(1)(B) OF THE HEALTH SERVICES ACT 2016
		Respondent

CatchWords	:	Industrial Law (WA) - Public Service Arbitrator - Matter referred for hearing and determination pursuant to s 44 - Interpretation of agreement entered into under the industrial agreement - Remuneration of radiologists - Transfer of services to Fiona Stanley Hospital - Meaning of 'end of transitioning' - Agreement dealt with the baseline earnings pool - Agreement did not expressly deal with annual reconciliation - Respondent's decision varied
Legislation	:	*Industrial Relations Act 1979* (WA) s 26(1)(a), s 44, s 80E
		Hospital and Health Services Act 1927 (WA) s 7
		Health Services Act 2016 (WA) s 32(1)(b)
Result	:	Application granted
Representation:		
Applicant	:	Mr S Bibby
Respondent	:	Ms R Sinton (as agent)

Cases referred to in reasons:

Director General, Department of Education v United Voice WA [2013] WASCA 287

Director-General Department of Justice v Civil Service Association of Western Australia Inc [2005] WASCA 244; (2006) 86 WAIG 231

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

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

Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2007) 87 WAIG 1199

Reasons for Decision

Background

1 On 15 March 2016, the Australian Medical Association (WA) Incorporated (**AMA**) filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA) (**Act**). The AMA and the Minister for Health (in his incorporated capacity under s 7 of the *Hospital and Health Services Act 1927* as the Metropolitan Health Service) were in dispute about the interpretation and application of an agreement the parties entered into in 2014 about how radiologists' baseline earnings would be calculated given the transfer of radiological services from several hospitals to Fiona Stanley Hospital.

2 The parties did not settle the matter at conferences held before Public Service Arbitrator (**Arbitrator**) Acting Senior Commissioner Scott. On 21 June 2016 the matter was referred for hearing and determination. The matter was reallocated to my chambers the same day.

3 The parties filed outlines of evidence and written submissions before this matter was heard on 8 December 2016 and 14 December 2016. On 14 December 2016, following the hearing and by consent, the name of the respondent was amended to 'South Metropolitan Health Service, established pursuant to s 32(1)(b) of the *Health Services Act 2016*' (**Health Service**).

The Memorandum

4 The Memorandum of Matters Referred for Hearing and Determination (**Memorandum**) states:

> 1. In 2014, in anticipation of the transfer of radiological services from a number of hospitals to Fiona Stanley Hospital, the parties entered into an agreement about how the radiologists' baseline earnings would be calculated, in accordance with cl 24(14) of the Department of Health Medical Practitioners (Metropolitan Health Service) AMA Industrial Agreement 2013.
> 2. The parties are in dispute about the interpretation and application of that agreement.
> 3. The AMAWA says:
>
> (a) It requested that there be a guarantee applied to the whole of the financial year to June 2015.
>
> (b) Fiona Stanley Hospital's management responded on 23 September 2014 that it would apply the guarantee from 'October 2014 to the 'end of transitioning' in February 2015'.
>
> (c) The respondent made a decision on 22 December 2015 to reconcile the value of the baseline earnings pool on an annual basis, taking account of the whole of February 2015. This is based on an erroneous and unfair view that the transitioning arrangement ended at the beginning of February 2015 when the AMAWA says it included the whole of February 2015.
>
> (d) The respondent's interpretation and application of the agreement is incorrect and unfair. Due to the fact that commissioning was only partially complete at the beginning of February 2015, and for reasons beyond the control of the radiologists, they could not make their targets for the first two weeks of that month. The respondent wishes to include the month of February in the end of financial year calculations, which will adversely affect the earnings of the radiologists.

(e) Radiologists took up offers of employment at Fiona Stanley Hospital on the basis that their baseline earnings would be guaranteed for the transitional period and they have been disadvantaged.

4. Remedy

The applicant seeks that the Public Service Arbitrator review and modify the respondent's decision to ensure that the shortfall in radiological services that occurred in February 2015 is not taken into account for the purpose of the annual reconciliation.

Respondent

5. The respondent says:

(a) That its interpretation of the agreement between the parties is correct. It says that the transitional period ended on 3 February 2015 and therefore February 2015 should be taken into account in the annual reconciliation.

(b) Radiologists were paid the agreed value of the base line earnings pool in accordance with the exchange of letters. From the end of the transitional period on 3 February 2015 through to June 2015, $326,459 was paid in each month based on the agreed value of 13,333 services per month.

(c) At the end of the 2014/2015 financial year, actual radiological service activity for the period February 2015 to June 2015 was calculated in accordance with cl 24(8) of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013. As a result, a top up payment was made to the baseline earnings pool.

(d) Radiologists have been compensated for services performed and therefore the matter ought to be dismissed.

The law

5 The Arbitrator has exclusive jurisdiction to inquire into and deal with any industrial matter relating to government officers: s 80E of the *Industrial Relations Act 1979* (WA); ***Director-General Department of Justice v Civil Service Association of Western Australia Inc*** [2005] WASCA 244; (2006) 86 WAIG 231 (***Jones***). While there is no power of judicial review, the Arbitrator has very wide powers. Section 80E of the Act contemplates a merits-based inquiry: ***Jones*** [28]-[29]. The Arbitrator can review and, if necessary, differ from the employer's decision as part of dealing with the industrial matter: ***Jones*** [33].

6 Acting President Ritter set out a useful summary of the Arbitrator's jurisdiction 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. He confirmed that s 26(1)(a) of the Act conditions the exercise of the Arbitrator's jurisdiction but 'does not give license to either a Commissioner or the Full Bench to do other than act according to law and construe the limits of the jurisdiction or the powers of the Commission other than on the basis of legal principle' [161], citing ***Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2007) 87 WAIG 1199 [48].

7 I must decide whether February 2015 should be excluded from the annual reconciliation. I must consider what the parties agreed and, to the extent allowable, what is fair in the circumstances.

How radiologists are paid

8 Radiologists are paid according to clause 24 of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013 (**industrial agreement**).

9 Half of a radiologist's pay is made up of salary and allowances, which is 50% of the salary of other medical practitioners. The other half of a radiologist's pay is paid under the piece rate system. Each radiological service is assigned a monetary value (a 'piece rate'). Each month, radiologists are paid according to the number of radiological services they perform. This money comes from a baseline earnings pool, which guarantees a minimum number of radiological services that radiologists will be paid for. This is set out in clause 24(5) of the industrial agreement:

(5) Value of baseline earnings pool.

(a) The value of the baseline earnings pool is calculated each financial year by multiplying 50% of the number of radiological services undertaken in the hospital during the 12 month period from 1 January 2012 to 31 December 2012 by the specified piece rate.

(b) Where the piece rate changes during the course of a particular financial year the respective amounts shall be applied pro-rata to determine the value of the baseline earnings pool for that financial year.

10 If the actual number of radiological services performed in a financial year is more than the guaranteed minimum number of radiological services, money is added to the baseline earnings pool so that radiologists are paid for the radiological services provided above the guaranteed minimum number. This is done as part of an annual reconciliation. Clause 24(8) of the industrial agreement states:

(8) Additional piece rate remuneration if actual activity in any financial year exceeds certain limits.

(a) As soon as reasonably practicable after the end of each financial year the employer shall calculate what the value of the baseline earnings pool would have been if it had been calculated on the basis of actual radiological service activity during that financial year.

(b) If the value derived under (a) above is greater than the previously established value of the baseline earnings pool, the employer shall top up the baseline earnings pool for that financial year by the difference between the two amounts.

(c) This provision does not apply if the actual number of radiological services undertaken during a financial year falls below 90% of the number of radiological services undertaken in the hospital during the 12 month period from 1 January 2012 to 31 December 2012.

11 Under the industrial agreement, the guaranteed minimum number of radiological services for the baseline earnings pool is half the number of radiological services provided in 2012. As Fiona Stanley Hospital did not exist in 2012, a baseline earnings pool cannot be calculated. To deal with this, clause 24(14) of the industrial agreement allows the parties to agree to vary the value of the baseline earnings pool:

(14) Notwithstanding any other provision of this Agreement, the value of base line [sic] earnings pools will be varied from time to time, to the extent agreed between the employer and the Radiologists affected and the AMA, to take into account the movement of activity from one hospital or group of hospitals to another hospital or group of hospitals because of change associated with the commissioning of Fiona Stanley Hospital, Fremantle Hospital and Royal Perth Hospital. If agreement about the extent of change reasonably required cannot be reached, either party may refer the matter to the Western Australian Industrial Relations Commission in accordance with Clause 54 - Dispute Settling Procedures and the matter will be determined by the Commission. This provision applies only for the term of this Agreement and will be removed in the next Agreement.

AMA witness - Ms Kuhne's evidence

12 Ms Kuhne has been the AMA's Director of Industrial/Legal for the past four and a half years.

13 Ms Kuhne gave evidence about how radiologists are paid. The purpose of having a baseline is to guarantee earnings. If actual activity goes above the guaranteed baseline, clause 24(8) of the industrial agreement allows an additional payment to be made to radiologists.

14 Clause 24(14) was included in the industrial agreement to allow the parties to establish a new baseline earnings for radiologists at Fiona Stanley Hospital.

15 Ms Kuhne gave evidence about how an agreement was reached between the parties under clause 24(14) of the industrial agreement.

16 On 31 July 2014 Ms Kuhne sent a letter to Dr Mark, Director of Clinical Services at Fiona Stanley Hospital (Exhibit A2 (Exhibit 1)) (**AMA letter**), which stated:

Dear ~~Dr Mark~~ Paul

I write pursuant to clause 24(14) of the *Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2013*:

"Notwithstanding any other provision of this Agreement, the value of base line earnings pools will be varied from time to time, to the extent greed [sic] *between the employer and the Radiologists affected and the AMA, to take into account the movement of activity from one hospital or group of hospitals to another hospital or group of hospitals because of change associated with the commissioning of Fiona Stanley Hospital, Fremantle Hospital and Royal Perth Hospital. If agreement about the extent of change reasonably required cannot be reached, either party may refer the matter to the Western Australian Industrial Relations Commission in accordance with Clause 54 – Dispute Settling Procedures and the matter will be determined by the Commission. This provision applies only for the term of this Agreement and will be removed in the next Agreement."*

With regard to the required commissioning timeline for Fiona Stanley Hospital (FSH), the AMA proposes the following for the value of the base line pool for radiology at FSH:

For the month of:

October 2014	833 per month
November 2014	1,667 per month
December 2014	2,167 per month
January 2015	2,167 per month
From February 2015 onwards	13,333 per month
(160 000 per year)	

With regard to the transition of services from Fremantle Hospital (FH), the AMA proposes the following for the value of the base line pool for radiology for FH:

From February 2015 onwards	2,583 per month
(31, 000 per year)	

I look forward to your confirmation of the above estimation of the value of the base line earnings pools as soon as possible.

Yours sincerely

[signed]

MARCIA KUHNE

DIRECTOR, INDUSTRIAL/LEGAL

(original emphasis)

17 In response to her letter, Dr Mark sent Ms Kuhne the following letter dated 5 August 2014 (Exhibit A9):

> Dear Marcia
>
> In response to your letter 31 July 2014 addressed to Dr Paul Mark, and following consultation with the Co-Directors, I can confirm that the projected baseline activity in Radiology examinations at Fiona Stanley Hospital (FSH) for October 2014 to end of transitioning February 2015 as quoted in your letter are reflected in the activity profiles for FSH.
>
> I have spoken to the Head of Service for Radiology at FSH and Fremantle Hospital (FH) who has indicated the figures mentioned for FH are also reflective of expected volumes post downsizing. However it would be prudent for FH Co-Directors to comment rather than FSH.
>
> Yours sincerely
>
> [signed]
>
> Dr Paul Mark
>
> **DIRECTOR OF CLINICAL SERVICES FIONA STANLEY HOSPITAL**
>
> (original emphasis)

18 On 22 August 2014 Ms Kuhne sent a letter to Dr Keenan, Acting Director of Clinical Services at Fiona Stanley Hospital, asking him to confirm authorisation for the proposed funding schedule for Fiona Stanley Hospital (Exhibit A2 (Exhibit 2)). I understand Ms Kuhne's evidence to refer to the proposed value of the baseline pool for radiology in the AMA letter.

19 On 23 September 2014, Dr Mark sent Ms Kuhne the following letter (Exhibit A2 (Exhibit 3)):

> Dear Ms Kuhne
>
> **Re: Radiologists – value of base line earnings pools at Fiona Stanley Hospital and Fremantle Hospital.**
>
> Thank you for your letter of 22 August 2014 to Dr John Keenan
>
> I confirm that the projected baseline activity in Radiology examinations at Fiona Stanley Hospital for October 2014 to the end of transitioning in February 2015 is as quoted in your letter of 31 July 2014.
>
> These activity levels are reflected in the activity profiles for Fiona Stanley Hospital and are therefore fully funded.
>
> Yours sincerely
>
> [signed]
>
> Dr Paul Mark
>
> **DIRECTOR OF CLINICAL SERVICES FIONA STANLEY HOSPITAL**

20 Ms Kuhne gave evidence that she was quite satisfied with Dr Mark's response. She understood it to mean that the hospital agreed to fully fund the baseline set out in the AMA letter through to the end of transitioning, which she understood to mean until the radiological activity had reached the normal operating level of a fully operational hospital.

21 Ms Kuhne gave evidence that she would have told Dr Price, who was the head of the radiology department, that all appeared to be confirmed and agreed, and she was later surprised by the dispute about what had been agreed.

22 Ms Kuhne gave evidence that around the time that the parties reached their agreement through the exchange of letters, it was very uncertain as to when Fiona Stanley Hospital would be fully operational. There had already been significant delay and it was assumed at that time that the hospital would be fully operational 'at some point during February, but probably toward the end of February' (ts 19).

23 In cross-examination, Ms Kuhne agreed that she did not query what Dr Mark meant by 'end of transitioning'. She did not accept that the AMA was confident at the time the agreement was reached that Fiona Stanley Hospital's emergency department would open on 3 February 2015.

24 I understand Ms Kuhne's evidence to be that at the time the agreement was reached, there was no certainty about exactly when commissioning would finish and full activity would commence.

AMA witness - Dr Price's evidence

25 Dr Price was the Head of Imaging for Fiona Stanley, Fremantle and Rockingham General Hospitals from December 2013 and worked in that position until July 2016. He was previously a consultant at Fremantle Hospital since 2006.

26 He gave evidence about how he set up the radiological department at Fiona Stanley Hospital, including recruiting new staff. Dr Price also gave evidence about how the agreement was reached between the AMA and the Health Service.

Recruitment

27 As head of department, Dr Price was responsible for the successful commissioning and opening of Fiona Stanley Hospital's radiology department. Setting up the radiology department involved transferring existing staff to Fiona Stanley Hospital and recruiting new staff. Dr Price explained that the opening of Fiona Stanley Hospital was 'very complex and hadn't had the easiest or most straightforward start in WA … [which was] known to…the people I'd be trying to recruit' (ts 27). It would have been easier to recruit had they 'had a good tailwind behind [them]…[the project] didn't have a proven track record of success or ease at that stage' (ts 28).

28 Dr Price was concerned about recruitment for Fiona Stanley Hospital because radiologists are at a unique disadvantage if there are delays or issues with the steady provision of work. In discussions with staff transferring from Fremantle Hospital, Dr Price assured staff that they would enjoy the same terms and conditions as their existing arrangements. Dr Price felt that it was

important that new staff received the same benefits and not be disadvantaged when compared to existing radiologists at a fully functioning hospital.

The agreement

29 Because it was clear to Dr Price from early on in the process that staff at Fiona Stanley Hospital would need similar conditions to their existing conditions, he tried to agree an arrangement with the Health Service for 'a variable baseline that would match the staff who were coming on board to the proposed schedule to ensure that there was a continued flow to their salary irrespective of the number of cases that the hospitals actually do' (ts 34). Dr Price gave evidence that the approach he set out in his letter to Mr Warner, Executive Director Workforce WA Health Industrial Relations, on 21 November 2013 (Exhibit A7) was rejected.

30 Dr Price explained how he selected the numbers Ms Kuhne used in the AMA letter. 13,333 radiological services per month equates to 160,000 cases per year and 16 FTE radiologists. I understand his evidence to be that the radiology department needed a full complement of staff by February 2015, before the hospital was fully functioning. The numbers reflect the need for staff before the hospital was fully functioning. The numbers do not relate to phase 3 or phase 4 of Fiona Stanley Hospital's phased opening. The reference to February onwards refers to staff. The timetable for opening extended into March.

31 Dr Price said he was first aware that phase 4 would be brought forward to the middle of February 2015 when it occurred. Dr Price had no discussions with Dr Mark or Mr Whennan about the critical date being the opening of the emergency department. Dr Price gave evidence that had he known how the Health Service interpreted the agreement between it and the AMA, that would have been of enormous concern to everyone involved in the project. In particular, he would have been unable to recruit enough radiologists of sufficient calibre for the radiology department to open on schedule and it would have made Dr Price's position untenable.

32 Dr Price gave evidence that Dr Mark's response on 23 September 2014 was an agreement, essentially, with the terms, thrust and content of Ms Kuhne's suggestion in the AMA letter. Dr Mark's response was not a rebuttal. It did not introduce different terms. There was nothing in Dr Mark's response suggesting that the hospital would open on the day the emergency department opened in February.

33 The only place a baseline exists for Fiona Stanley Hospital is in the AMA letter. He says that while the Health Service argues that it only agreed to guarantee that baseline up to the end of January effectively, it paid for additional services under clause 24(8) of the industrial agreement for the following financial year using 13,333 radiological services as the baseline. Dr Mark's reply on 5 August 2014 (Exhibit A9) refers to 'end of transitioning February 2015 as quoted in your letter'. Dr Price says that it is not apparent from Dr Mark's reply that 'transitioning' as it related to the commissioning of Fiona Stanley Hospital meant the opening of the emergency department on 3 February 2015.

34 Dr Price says that another interpretation is that after February 2015, the numbers in the AMA letter stopped changing, so 'transitioning' is up to and including February. Dr Price says that Exhibit A10 (a chain of emails) shows his understanding of the agreement which includes that the baseline earnings pool be set at 160,000 per year (13,333 per month) from February 2015 onwards and that this was vital to recruitment. He says the reply to his email, which set out the proposed baseline earnings pool values, indicates that the figures were accepted.

35 Dr Price's evidence is that Dr Mark's letter of 23 September 2014 is a general agreement to the proposal made by the AMA. Transition involves change in activity levels. Activity levels stop changing after February. This is different to commissioning. Transitioning is not when the emergency department opens. The tone of Dr Mark's letter in September is one of agreement rather than a change of the AMA terms on a set date, which is not included, about an event which is not mentioned.

36 In cross-examination, Dr Price did not agree that when Dr Mark's letter was sent in September 2014, Dr Price knew that phase 4 was set for March 2015. Dr Price did not agree that most radiology activity is generated by emergency department patients. In cross-examination, Dr Price gave evidence that the AMA letter did not propose October 2014 to February 2015. He said there was no end date in the AMA letter.

37 Dr Price gave evidence that phase 3, the opening of the emergency department and most other specialities, was a significant part of radiological service provision but not the planned end of opening of Fiona Stanley Hospital. Heart and lung transplant services also call on the radiology department. He said while phase 4 was planned for 23 March 2015, the opening of the hospital and the bedding down of significant transitions is still ongoing.

38 Dr Price was surprised the Health Service did not honour the agreement he understood had been reached. Dr Price understood the parties had agreed to the arrangement suggested by the AMA.

39 Dr Price gave evidence that this issue has impacted on morale. The Health Service has given with one hand and taken away with the other for the month of February 2015.

Health Service witness - Dr Mark's evidence

40 Dr Mark is the Director of Clinical Services at Fiona Stanley Hospital and has been in this position since January 2013. From May 2014 to November 2016 he was the hospital's Acting Executive Director.

41 Dr Mark gave evidence about the agreement he reached with Ms Kuhne and the timing of the various phases of the commissioning of Fiona Stanley Hospital. The phases were published in The West Australian newspaper in October 2014 and communicated to staff via global emails.

42 Dr Mark understood the AMA letter indicated that the movement of activity would end at the end of January and he thought that was reasonable based on the phase 3 planned opening. From February 2015 onwards, the AMA letter contemplated a constant level of activity and he was happy to accept that.

43 Dr Mark was aware that Fiona Stanley Hospital involved budget overrun, with the auditor's report stating the budget was overrun by $1.3 billion in higher capital costs.

44 By February 2013, Dr Mark thought that the emergency department transfer was the significant time that the hospital really would get going. He said that by September 2014, it was 'highly likely' or 'pretty firm' that the emergency department transfer date was accurate (ts 80). In cross-examination, Dr Mark gave evidence that he did not discuss with Mr Warner that the emergency department opening was the critical date. They discussed whether the AMA activity projections were correct.

45 Mr Warner may have drafted Dr Mark's letter of 23 September 2014, but Dr Mark was satisfied with the content and signed it. He could not recall any contact with Dr Price by September 2014. Dr Mark's letter of 23 September 2014 is about movement of activity and phase 3 was the major part of the movement of activity. As much was clear in Dr Mark's mind and he thinks it was clear in Mr Whennan's mind as well. Dr Mark understood that he was agreeing with the movement of activity and said he might have put in a rationale for the agreement had he been disagreeing with Ms Kuhne, but he was not. He said 'it seemed pretty straightforward, because we were agreeing with the AMA's letter' (ts 82).

46 Dr Mark says that the term 'transition' in his letters meant 'movement of activity'. He did not use 'commissioning' in his letter because commissioning is a long process, post-opening of a hospital. Transition is reflected in clause 24(14) of the industrial agreement and that is about the movement of activity. Dr Mark confirmed in cross-examination that clause 24(14) of the industrial agreement does not use the word 'transition'. The bulk of the movement of activity that was part of the commissioning was phase 3.

47 In relation to the reconciliation, Dr Mark said the Health Service used the process in place at Royal Perth Hospital, which is the process contemplated in the agreement, which he said was 'patently clear' (ts 83). Dr Mark said his response agreed with Ms Kuhne's activity projections.

48 Exhibit A11 shows a graph with the actual number of radiological services ('cases') from October 2014 to June 2015 at Fiona Stanley Hospital and the baseline number of radiological services set out in the AMA letter:

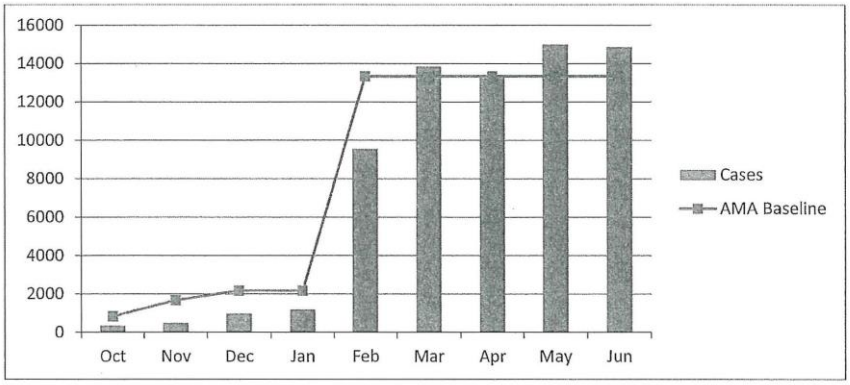


Exhibit A11

49 When shown Exhibit A11, Dr Mark agreed that perhaps the emergency department had not 'hit its straps' before 16 February. He gave evidence that the actual numbers in February were more than in January but less than in March. The numbers started to stabilise from March onward. The Health Service agreed to pay a monthly figure for October to January, and agreed to a baseline going forward, and then calculated the annual reconciliation in accordance with clause 24(8) of the industrial agreement. However, in re-examination Dr Mark gave evidence that under clause 24(8) of the industrial agreement, October 2014 to June 2015 should have been used to calculate the annual reconciliation but was not.

50 The Health Service treated October 2014 to January 2015 differently because 'it seemed the fair thing to do' and 'we thought that with activity changing so much it would be the right thing to do' (ts 89). Dr Mark said the whole point of clause 24(14) of the industrial agreement is 'that when activity is changing, people need some certainty' (ts 89).

51 The Health Service did not comply with the industrial agreement in relation to the October to January period in terms of the annual reconciliation because 'it was the fair thing to do while activity was so wildly fluctuating' and they thought '[they] were doing the fair and just thing' (ts 93 to 95). He said they thought this because it was obvious that there might be underactivity and the risk was that the radiologists would be continually under activity levels and they would have been severely under-remunerated (ts 93). He said between October and January, the Health Service paid month by month, and from February the activity levels proposed by the AMA had stabilised. Dr Mark's evidence is that by February the AMA's activity levels had stabilised, so clause 24(14) of the industrial agreement no longer applies because there is no further change. For that reason, the Health Service applied clause 24(8) of the industrial agreement. Dr Mark thought that there was a higher risk the radiologists would be well under activity levels between October and January and the intent of clause 24(14) of the industrial agreement was about the period of actual movement.

52 Dr Mark said that the reason his letter did not need to mention the emergency department transition is because the parties were agreeing to activity levels for the baseline earnings pool and Fiona Stanley Hospital agreed with the AMA. Dr Mark says that clause 24(14) of the industrial agreement is in place because a baseline earnings pool from 2012, which is referred to in clause 24(5) and clause 24(8), 'could never apply to a brand new hospital' (ts 92). He said clause 24(8)(c) cannot be referenced because Fiona Stanley Hospital was not open in 2012 but clause 24(8)(a) and clause 24(8)(b) were 'no problem' (ts 92). Dr Mark agreed this was not communicated in his letter.

Health Service witness - Mr Whennan's evidence

53 Mr Whennan is a Service Co-Director at Fiona Stanley Hospital and has been in this position since 1 July 2013. He was previously the Chief Medical Imaging Technologist at Royal Perth Hospital for 16 years.

54 Mr Whennan expected the majority of service activity to be generated following the opening of the emergency department on 3 February 2015. He understood 'end of transitioning in February 2015' to imply 'as soon as the bulk of the work came on' (ts 107). Mr Whennan gave evidence that the annual reconciliation was calculated based on what he 'considered [to be] a steady state, which was [the] beginning of February through to the end of June, not including October through to January' because he believed that was 'a special condition or arrangement as pursuant to the agreement which was agreed by Dr Mark and [Ms Kuhne]' (ts 108).

55 In 2015/2016, the reconciliation resulted in a top-up payment of about $559,000. Mr Whennan said it is not unfair that the radiologists who worked above their requirements in March to June 2015 have that wiped out because of February 2015. It was consistent with the agreement reached. From a taxpayer's point of view, it is unfortunate that the Health Service paid radiologists at Fiona Stanley Hospital $183,368 for services not provided, but necessary for patient care. He said compensation has been adequate, so the Health Service should not have to pay an additional $91,696 to the pool.

The AMA's submissions

Why an agreement was needed

56 Clause 24(1) to clause 24(9) of the industrial agreement require a fully functioning hospital to generate enough radiological services to ensure that a radiologist is adequately remunerated.

57 This is because radiologists must be guaranteed access to a certain volume of radiological services to receive their full salary. If they are not, radiologists will be paid less than other clinicians who are paid a base salary with other allowances.

58 The other tertiary hospitals in the metropolitan health system, for example Royal Perth Hospital and Sir Charles Gairdner Hospital, have a well-established supply of radiological services which provide an effective floor to ensure that radiologists receive enough radiological services to guarantee their salary.

59 Because Fiona Stanley Hospital was in the commissioning process and there were no patients in the opening months, it would have been difficult, if not impossible, to attract radiologists to assist in the commissioning phase. For this reason, the Health Service and the AMA agreed to include clause 24(14) in the industrial agreement. Clause 24(14) allowed a variation to baseline earnings 'to take into account the movement of activity from one hospital or group of hospitals to another hospital or group of hospitals because of the change associated with the commissioning of Fiona Stanley Hospital, Fremantle Hospital and Royal Perth Hospital'.

60 Without the agreement there would be no guaranteed floor for radiological activity as in other hospitals under clause 24(5)(a) and clause 24(8)(c) of the industrial agreement. The agreement reached between the parties meant Fiona Stanley Hospital could attract and retain radiologists during the commissioning phase of Fiona Stanley Hospital.

The agreement through the exchange of letters

61 The parties entered into an arrangement under clause 24(14) of the industrial agreement. The AMA requested a guarantee for the whole of the financial year to June 2015 in the AMA letter. The Health Service in its response on 23 September 2014 noted that it would apply the guarantee from October 2014 'to the end of transitioning in February 2015… as quoted in your letter of 31 July 2014'.

What did the agreement mean?

62 The figures quoted in the AMA letter were selected by Dr Price because they were based on the projected FTE staffing profile for the commissioning period:

Month	Figure	FTE Equivalent
October 2014	833	1
November 2014	1667	2
December 2014	2167	2.6
January 2015	2167	2.6
February onward	13333	16

Applicant's submissions [27]

63 Dr Price intended that by February 2015, he would have a full complement of staff. This is not because the commissioning phase would be complete, but because it was nearing completion and the workload needed to be managed before the Health Service received the volume of radiological services when all the other departments who used those services would be open.

64 Dr Price was concerned that without an agreement about baseline earnings during the commissioning process, he would not be able to attract and retain radiologists to Fiona Stanley Hospital during and after the commissioning process.

65 Many of the staff who were recruited to work at Fiona Stanley Hospital during the commissioning phase were familiar with clause 24 of the industrial agreement. It is reasonable to assume that those radiologists thought there would be no alteration to their baseline earnings or to any subsequent top-up payment through the annual reconciliation for the 2014/2015 financial year and beyond.

66 Dr Mark's letter dated 23 September 2014 is brief and insubstantial. It does not support the Health Service's interpretation of the agreement that was reached between the two parties, as set out in Mr Whennan's email to Mr Welman and Dr Price dated 22 December 2015. It is unclear from Dr Mark's letter whether the whole or part of the month of February is included. 'In February' should naturally mean the whole of the month. Dr Mark's letter also does not mention what will happen if the annual reconciliation under clause 24(8) of the industrial agreement is applied.

67 'The time of transition' could mean 'at the end of the commissioning phase'. The AMA says that at the time Dr Mark's letter was written, the projected opening of Fiona Stanley Hospital was on 23 March 2015, when the heart and lung transplant services would open. The AMA says that a more probable interpretation is that 'end of transitioning' would have meant the end of February 2015 because Fiona Stanley Hospital would be close to being fully operational. It is unfair and unreasonable for the Health Service to retrospectively claim it intended the guarantee to stop at the end of January 2015. The AMA submits that the evidence shows that Mr Warner, Executive Director Workforce WA Health Industrial Relations, was the architect of clause 24(14) of the industrial agreement and Mr Warner dealt with Ms Kuhne, Dr Price and Dr Mark about this issue. It is open to me to conclude that Mr Warner may have agreed with the AMA about the operation of clause 24(8) of the industrial agreement, but he was not called to give evidence.

68 The AMA submits that the terms 'commissioning' and 'transitioning' are not the same. A reasonable person would say that the AMA is talking about 23 March 2015 in the AMA letter. Clause 24(14) of the industrial agreement does not mention 'transition'. Rather it refers to 'commissioning'. Dr Mark gave evidence about 'the big bang' for radiologists being the opening of the emergency department. He also gave evidence that February was a quiet month and that numbers would eventually grow over a 12 month period. The AMA says that Dr Price's evidence shows that if a baseline earnings pool was not guaranteed and if the shortfall in February were to come off the radiologists' surplus, Fiona Stanley Hospital would have struggled to attract employees.

Parties never addressed how annual reconciliation would be treated

69 The parties never addressed how the annual reconciliation would be treated. Dr Mark's letter does not mention what will occur if the radiological services are above the baseline. His letter is silent on the issue of annual reconciliation.

It would be unfair not to modify the decision

70 The AMA says that it would be unfair not to modify the Health Service's decision. The radiologists received a smaller payment as part of the annual reconciliation because the month of February was included. They could not meet their target in February because the supply of radiological services was restricted due to matters beyond their control.

71 To modify the Health Service's decision would not set a precedent because clause 24(14) of the industrial agreement is not in the new 2016 industrial agreement.

72 This matter is not a breach of contract claim. While the Arbitrator cannot ignore the law, for example as it stands in relation to contract, fairness is relevant because the exercise of the Arbitrator's jurisdiction to enquire into and deal with industrial matters and to hear and determine the matters in the Memorandum is conditioned by s 26(1)(a) of the Act. The agreement reached between the parties is relevant but deficient in that it did not deal with all aspects. That led to an industrial dispute and the Arbitrator has wide powers to fix the dispute. The Arbitrator should consider what would have been fair in the circumstances.

73 If this matter is dismissed, the objects of the Act will not be met because the radiologists will be treated differently to other employees in that radiologists will bear the risk in the process of commissioning. It is reasonable to exclude the shortfall in February from the annual reconciliation in order to balance the need of the radiologists to have a guarantee and the need of the Health Service to have radiologists available during the commissioning phase in February 2015.

74 The objects of the Act include to promote goodwill in industry. The Arbitrator must consider what is fair for the parties to resolve the matter, without regard to technicalities and legal form. The AMA submits that it would not be fair to suggest that it was reasonable for radiologists to take the risk of engaging in employment at Fiona Stanley Hospital and accept that there could be a loss.

The Health Service's submissions

75 The Health Service says that radiologists at Fiona Stanley Hospital have been compensated for services performed. Radiologists have also been paid $183,368 for 7,489 services not performed between October 2014 and February 2015. In 2014/2015, the annual reconciliation resulted in a top up payment of about $880.

76 The agreement between the parties is very clear. The AMA letter only proposed varying the value of the baseline earnings pool during the commissioning of Fiona Stanley Hospital. It was also clear in the AMA letter that Fiona Stanley Hospital's baseline earnings pool would be 13,333 from February 2015 onwards. Dr Mark's letter dated 23 September 2014 confirms the projected baseline activity from October 2014 to 'the end of transitioning in February 2015 is as quoted in [the AMA letter]'.

77 The Health Service says that to work out what 'end of transitioning' means, the Arbitrator must ask what a reasonable person would have understood the parties to the agreement to have meant: ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18], applying the reasoning of ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22]. Consideration must be given not only to the text of the letters but also the surrounding circumstances known to the parties and the purpose and object of the transaction. The Health Service says that the planned opening of the emergency department at Fiona Stanley Hospital was widely publicised around the time the agreement was made, for example, it was publicised in The West Australian newspaper on 3 October 2014. The AMA was aware on 31 July 2014 that Fremantle Hospital emergency department would transition to Fiona Stanley Hospital on 3 February 2015.

78 Radiological service activity is predominantly generated by emergency department presentations. There could not have been any confusion about what was meant by 'February' in Dr Mark's letter dated 23 September 2014 because phase 4 of the commissioning process was not due until 23 March 2015 at the time the agreement was reached and was later brought forward to 16 February.

79 The parties never addressed the question of how the annual reconciliation of service activity would be treated during commissioning. Absent any written agreement to the contrary, the terms of the industrial agreement apply.

80 Had the Health Service strictly applied the industrial agreement in doing the annual reconciliation, there would not have been any payment made to the baseline earnings pool. The Health Service excluded October 2014 to January 2015 from the annual reconciliation in good faith because the emergency department generated the majority of radiological services demand at Fiona Stanley Hospital and the emergency department opened on 3 February 2015. If the AMA had any concerns or queries about the annual reconciliation, it should have raised them.

81 It would be unfair if I modify the Health Service's decision to exclude the actual activity for February 2015 in the annual reconciliation because the Health Service would have to pay $91,696 more, despite having paid $183,368 for services that were not performed. The Health Service has paid radiologists for the services performed and those not performed. This matter is about radiologists taking the opportunity get additional money to which they are not entitled.

82 The Health Service says that clause 24(14) of the industrial agreement enabled the parties to reach an agreement about the value of the baseline earnings pool to account for the movement of activity from Royal Perth Hospital and Fremantle Hospital to Fiona Stanley Hospital. The agreement varied clause 24(5) of the industrial agreement because it varied the value of the baseline earnings pool. The agreement did not vary clause 24(8) of the industrial agreement, which is the methodology used to determine the annual reconciliation. The Health Service maintains that while clause 24(8)(c) of the industrial agreement applies, the date range of January to December 2012 in that subclause may not specifically apply so that what was agreed in the letters, the 13,333, replaces the date range of January to December 2012.

83 The Health Service submits that the radiologists have been compensated in accordance with the exchange of letters and the industrial agreement. It is within the Arbitrator's power to accept or reject whether the radiologists have been adequately compensated. This matter should be dismissed.

Consideration

84 In considering this matter, I am mindful of my obligations under s 26(1)(a) of the Act.

What did the parties agree?

85 The AMA letter refers to the *commissioning* timeline for Fiona Stanley Hospital and the *transition* of services from Fremantle Hospital for the purpose of the baseline earnings pool for each hospital.

86 Dr Mark may have thought phase 3 was the critical date for the agreement but I accept that he did not discuss that with the AMA or Dr Price.

87 I agree with Dr Price that Dr Mark's letter dated 23 September 2014 indicates agreement and not a change of the AMA terms. Dr Mark's evidence was 'we were agreeing with the AMA's letter' (ts 82).

88 It is not apparent from Dr Mark's letter dated 23 September 2014 that 'transitioning' as it relates to the commissioning of Fiona Stanley Hospital refers to the opening of Fiona Stanley Hospital's emergency department on 3 February 2015. The language in Dr Mark's letter is imprecise. If he meant to tell the AMA that the baseline earnings pool would be guaranteed until the opening of the emergency department on 3 February 2015, he should have done that.

89 In any event, Dr Mark says there was no need for his letter to mention the opening of Fiona Stanley Hospital's emergency department because he was agreeing to the AMA's activity levels.

90 March is the first month that activity levels in the AMA letter do not change. Activity levels therefore stabilise in March, not February.

91 The AMA letter focuses on movement of activity in the sense of the number of radiological activities. Dr Mark's focus in evidence seemed to be on the movement of activity in the sense of the physical movement of the radiology department from Fremantle Hospital to Fiona Stanley Hospital. But I accept Dr Mark's evidence that he agreed with the activity levels proposed in the AMA letter. I am not persuaded by Mr Whennan that the 'end of transitioning in February 2015' implies 'as soon as the bulk of the work came on', by which I understand him to mean the opening of the emergency department at Fiona Stanley Hospital.

92 I think a reasonable person would have understood 'end of transitioning in February 2015' to include the whole of the month of February.

93 On the Health Service's argument, if the 'end of transitioning in February 2015' means until 3 February, then there is no agreement about the baseline for at least March 2015 onwards. On one hand, the Health Service has said there was no agreement about the annual reconciliation and the agreement was only about the baseline earnings pool for monthly salary. On the other hand, consistent with Dr Mark's evidence, the Health Service agrees it has applied the AMA's proposed activity level of 13,333 per month from February 2015 onwards in the annual reconciliation because this was agreed through the exchange of the AMA letter and Dr Mark's letter dated 23 September 2014. It leads me to conclude the Health Service agreed with the proposal in the AMA letter and the AMA's interpretation is what was intended and what is fair.

94 Absent anything express, I do not accept that a reasonable person would have understood 'transitioning' to mean 'the opening of Fiona Stanley Hospital's emergency department on 3 February 2015'.

95 That the parties were aware at the time the agreement was reached that phase 4 was scheduled in March 2015 does not lead me to conclude that the term 'end of transitioning in February 2015' means the opening of Fiona Stanley Hospital's emergency department on 3 February 2015. I accept that there was no certainty about exactly when the various phases would occur.

96 I accept Dr Price's evidence that the point of his proposed numbers in the AMA letter was about having a full complement of staff before the hospital was fully functioning. The numbers do not relate to phase 3 or phase 4 in particular.

97 A reasonable person would understand 'transitioning' to be about a change in activity levels and the setting up of Fiona Stanley Hospital's radiology department. The proposed activity levels change from October 2014 up to and including February 2015. Dr Mark's evidence was that emergency department activity grows over the year. In fact, it is only in March 2015 that activity levels, proposed and actual, stop changing. At a minimum, 'to the end of transitioning' means up to and including the month of February.

What is fair in the circumstances?

98 The Health Service and Dr Mark acknowledged it would not have been fair to include October 2014 to January 2015 in the annual reconciliation. Those months were excluded from the annual reconciliation, even though the parties never expressly agreed to that.

99 I agree it would not have been fair to include the months when Fiona Stanley Hospital was not functioning in the way a hospital ordinarily would. That was part of the basis of the need for an agreement. The agreement was reached because of the unique makeup of the radiologists' remuneration. Fiona Stanley Hospital did not have an estimated baseline earnings pool under clause 24(5) of the industrial agreement. Radiologists would have been disadvantaged by working in a hospital that was not functioning in the way a hospital ordinarily would. I accept Dr Price's evidence that he would not have been able to recruit and retain radiologists without the agreement. That was why Dr Price raised the need for an agreement as early as November 2013, even before he was appointed head of the radiology department. I accept that Exhibit A10 shows Dr Price's understanding that the baseline earnings pool would be set at 13,333 per month from February 2015 onwards and that this was vital to recruitment. I agree that the reply to the AMA letter and Dr Price's email indicates the Health Service accepted those figures.

100 I am not persuaded by the Health Service that, without a written agreement to the contrary, the terms of the industrial agreement apply. That argument would carry more weight if this matter involved a simple breach of contract claim. The AMA is not asking that I ignore an express agreement reached about the annual reconciliation. The Health Service's argument does not address fairness and equity, which are relevant to resolving this industrial dispute. Further, the industrial agreement assumes a baseline earnings pool based on figures from 2012, when Fiona Stanley Hospital did not exist.

101 The agreement between the parties did not only relate to the value of the baseline earnings pool. The agreement did not prevent the parties from varying the method used to calculate the annual reconciliation at clause 24(8) of the industrial agreement. The commissioning of Fiona Stanley Hospital meant that the parties needed to reach an agreement about the baseline earnings pool for the purpose of clause 24(5) and clause 24(8). The Health Service has artificially applied clause 24(8). The agreed value of the baseline earnings pool must affect both clause 24(5) and clause 24(8), otherwise clause 24(8) cannot operate because Fiona Stanley Hospital did not exist in 2012.

102 Although the parties did not expressly deal with the annual reconciliation in the agreement, it was reasonable for the AMA to expect that the activity levels proposed in the AMA letter would apply in relation to the baseline earnings pool and the annual reconciliation. Indeed, without an express agreement, the Health Service has applied those activity levels to the annual reconciliation from March 2015 to this day.

103 I am not persuaded by the Health Service's submission that the radiologists have been adequately compensated. It is a question of what was agreed and what is equitable in the circumstances. The radiologists have not been compensated in accordance with the agreement reached through the exchange of letters, nor adequately in the circumstances.

104 To include February 2015 in the annual reconciliation when phase 4 was not complete until 16 February 2015, and proposed and actual activity figures were still changing until March 2015, is unfair.

105 The effect of including February 2015 in the annual reconciliation is that the radiologists were not paid for work they did above the baseline once the hospital was fully functioning.

106 To pay the baseline in February 2015 but not to guarantee it, because the actual activity figures for February 2015 were used in the annual reconciliation, is unfair.

107 The parties did not reach an express agreement about how the annual reconciliation would be calculated. In those circumstances, it is not equitable for the Health Service to have the benefit of the radiologists' work (or availability to work) while expecting the radiologists to bear the risk of their remuneration falling below the customary baseline because of factors outside the radiologists' control which are due to the commissioning process.

108 The month of February 2015 should not be included in the annual reconciliation for 2014/2015. I will adjust the Health Service's decision so that February 2015 is excluded from the annual reconciliation for 2014/2015.

2017 WAIRC 00062

DISPUTE RE AN AGREEMENT MADE UNDER CLAUSE 24(14) OF THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	SOUTH METROPOLITAN HEALTH SERVICE, ESTABLISHED PURSUANT TO S 32(1)(B) OF THE HEALTH SERVICES ACT 2016
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 6 FEBRUARY 2017
FILE NO	PSACR 5 OF 2016
CITATION NO.	2017 WAIRC 00062

Result	Application granted
Representation	
Applicant	Mr S Bibby
Respondent	Ms R Sinton (as agent)

Order

HAVING heard Mr S Bibby on behalf of the applicant and Ms R Sinton (as agent) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on her under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the respondent's decision be adjusted so that the month of February 2015 is excluded from the 2014/2015 annual reconciliation for radiologists at Fiona Stanley Hospital.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service arbitrator.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch	The Department of Fire and Emergency Services	Scott CC	C 12/2016	21/07/2016	Dispute re clause 14 and 15 of the Department of fire and Emergency Services Fleet and Equipment Services - Enterprise Bargaining Agreement 2013	Discontinued
The United Firefighters Union of Australia, West Australian Branch	The Department of Fire and Emergency Services	Kenner SC	C 21/2016	28/10/2016	Dispute re performance management of a union member	Discontinued
Western Australian Municipal Administrative, Clerical and Services Union of Employees	The Chief Executive Officer Town of Narrogin	Emmanuel C	C 3/2016	26/04/2016	Dispute re alleged outstanding leave entitlement	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2017 WAIRC 00026

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD GIVEN ON 7 NOVEMBER 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SPARKS 'N' SECURITY PTY LTD AND RITZLINE PTY LTD T/A IC COOL REFRIGERATION, MECHANICAL AND ELECTRICAL SERVICES
	APPLICANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 16 JANUARY 2017
FILE NO.	APPL 67 OF 2016
CITATION NO.	2017 WAIRC 00026

Result Directions issued

Direction

WHEREAS this is an application pursuant to s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* filed on 18 November 2016; and

WHEREAS on 9 December 2016, the Commission issued directions in preparation for the hearing of this matter ([2016] WAIRC 00924; (2016) 96 WAIG 1639); and

WHEREAS on 12 January 2017, the respondent wrote to the Commission indicating that the parties request that the directions be amended to give the parties more time to 'agree to the relevant facts', and attached a minute of consent order to that effect signed by both parties; and

WHEREAS the Commission is satisfied that it is expedient for the expeditious and just hearing and determination of the matter that the directions be amended for that reason.

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby directs:

1. THAT the directions issued in this matter on 9 December 2016 ([2016] WAIRC 00924; (2016) 96 WAIG 1639) be cancelled.
2. THAT the applicant file and serve particulars of the application by 16 January 2017.
3. THAT the parties file an agreed statement of facts by 27 January 2017.
4. THAT by 7 February 2017, the applicant file and serve:
   (a) any witness statements and documents upon which it intends to rely; and
   (b) a brief outline of submissions and a list of authorities.
5. THAT by 21 February 2017, the respondent file and serve:
   (a) any witness statements and documents upon which it intends to rely; and
   (b) a brief outline of submissions and a list of authorities.
6. THAT the witness statements will constitute the evidence in chief of each witnesses.
7. THAT the parties are to advise each other and the Commission of which witnesses they will require for cross-examination.
8. THAT the matter will be heard on 7 March 2017.
9. THAT the parties have liberty to apply.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2016 WAIRC 00851

DISPUTE RE PERFORMANCE MANAGEMENT OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE UNITED FIREFIGHTERS UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE DEPARTMENT OF FIRE AND EMERGENCY SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	FRIDAY, 28 OCTOBER 2016
FILE NO.	C 21 OF 2016
CITATION NO.	2016 WAIRC 00851

Result	Recommendation issued
Representation	
Applicant	Ms L Anderson
Respondent	Mr S Musson

Recommendation

WHEREAS on 25 October 2016 the United Firefighters Union of Australia, West Australian Branch made an application under s 44 of the *Industrial Relations Act 1979* for an urgent compulsory conference in relation to a dispute between it and the Department of Fire and Emergency Services regarding a union member Communications Service Officer Ms Terena Cook;

AND WHEREAS the substance of the dispute relates to what the Union contends has been unfair and unreasonable supervision of CSO Cook during a trial period of work. The Commission was informed that CSO Cook was transferred out of the Communications Centre and into the State Wide Operational Response Division for a three month trial period commencing 30 August 2016. This arose from issues raised by the Department concerning CSO Cook's excessive absenteeism and some absences from the workplace without notification or approval;

AND WHEREAS the Union outlined to the Commission significant health issues that CSO Cook has experienced over a period of time which have been the subject of medical review and report, the most recent of which suggested that CSO Cook was now medically fit to return to her normal duties. The Union further informed the Commission that during the trial period at SWORD, CSO Cook has been subject to unfair and unreasonable supervision and has not been provided with organised, properly planned or meaningful work, or a suitable work environment. Meetings between the Union and the Department most recently, have failed to resolve the issues in dispute;

AND WHEREAS the Department referred to ongoing difficulties in relation to the supervision and management of CSO Cook caused by excess absenteeism and the impact this has had on its operations. Whilst the Department disputed the Union's assertions that CSO Cook has been unfairly and unreasonably supervised since the commencement of the trial period, it has proposed an alternative course of action. This is that CSO Cook be allocated to another work area under the supervision of Superintendent Hinton, during which time an assessment of CSO Cook's performance will be undertaken;

AND WHEREAS the Commission is aware, from observations made during the course of the conference, that the matters in dispute and related issues, have a lengthy history. However, the Commission informed the parties that in its view the most constructive way of addressing the issues in dispute is to move forward in addressing the concerns expressed by both the Union and the Department in relation to CSO Cook's performance and management in the workplace. After having heard the parties the Commission indicated that it intended to make a recommendation in an endeavour to assist in the resolution of the matters in dispute;

NOW THEREFORE the Commission pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979, hereby recommends –

(1) THAT CSO Cook's allocation to Superintendent Hinton in Emergency Management and Hazard Planning be for a period of three months from 7 November 2016, following which a review as foreshadowed by the Department will be undertaken.

(2) THAT CSO Cook be given, during the course of the three month period, meaningful work to perform consistent with her skills, qualifications and experience and that she also be provided with an appropriate workstation and facilities.

(3) THAT there be ongoing feedback and support given to CSO Cook during the three month period by those responsible for her supervision.

(4) THAT the compulsory conference will be relisted for a report back on a date and at a time determined by the Commission as soon as practicable after the end of the three month period or on an earlier date, on the application of either party.

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

2016 WAIRC 00388

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 27 JUNE 2016
FILE NO.	CR 31 OF 2015
CITATION NO.	2016 WAIRC 00388

Result	Direction issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr A Mason of counsel

Direction

HAVING heard Mr D Stojanoski of counsel on behalf of the applicant and Mr A Mason of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent file and serve a notice of answer by 18 July 2016.

(2) THAT each party shall give informal discovery.

(3) THAT the parties file an agreed statement of facts by no later than 12 weeks prior to the date of the hearing.

(4) THAT the applicant file and serve an outline of witness evidence upon which he intends to rely by no later than 10 weeks prior to the date of the hearing.

(5) THAT the respondent file and serve an outline of the witness evidence upon which it intends to rely by no later than eight weeks prior to the date of the hearing.

(6) THAT the applicant file and serve an outline of submissions and any list of authorities upon which he intends to rely by no later than four weeks prior to the date of the hearing.

(7) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than two weeks prior to the date of the hearing.

(8) THAT the application be listed for hearing for two days on dates to be fixed.

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

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

2016 WAIRC 00658

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 15 JULY 2016
FILE NO.	CR 31 OF 2015
CITATION NO.	2016 WAIRC 00658

Result	Direction issued
Representation	(by correspondence)
Applicant	Mr D Stojanoski of counsel
Respondent	Mr D Anderson of counsel

Direction

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979* (the Act); and

WHEREAS on Monday, 27 June 2016, the Commission issued directions ([2016] WAIRC 00388) in preparation for the hearing of the matter; and

WHEREAS by email on Wednesday, 13 July 2016, the parties informed the Commission that an agreed settlement may be possible facilitated by an adjournment of the matter for a further four weeks; and

WHEREAS the Commission is of the opinion that in the circumstances it is appropriate to amend the directions;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, hereby directs:

1. THAT the directions issued on Monday, 17 June 2016 ([2016] WAIRC 00388) be, and are hereby withdrawn.
2. THAT the respondent file and serve a notice of answer by 15 August 2016.
3. THAT each party shall give informal discovery.
4. THAT the parties file an agreed statement of facts by no later than Friday, 5 August 2016.
5. THAT the applicant file and serve an outline of witness evidence upon which he intends to rely by no later than Friday, 19 August 2016.
6. THAT the respondent file and serve an outline of the witness evidence upon which it intends to rely by no later than Friday, 26 August 2016.
7. THAT the applicant file and serve an outline of submissions and any list of authorities upon which he intends to rely by no later than Friday, 9 September 2016.
8. THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than Friday, 23 September 2016.
9. THAT the application be listed for hearing on Monday, 3 October 2016 and Tuesday, 4 October 2016.
10. THAT the parties have liberty to apply on short notice.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2017 WAIRC 00035

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BARRY LANDWEHR
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 23 JANUARY 2017
FILE NO.	U 93 OF 2016
CITATION NO.	2017 WAIRC 00035

Result	Directions amended
Representation	**(by written correspondence)**
Applicant	Mr D Stojanoski, of counsel
Respondent	Mr J Carroll, of counsel

Direction

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

WHEREAS on 21 October 2016, the Commission issued Directions to program the matter through to hearing ([2016] WAIRC 00840; (2016) 96 WAIG 1564); and

WHEREAS on 18 January 2017, the parties requested that the Directions be amended to have the matter be heard on the papers; to have full submissions filed; and to extend the time for filing submissions; and

WHEREAS the Commission is of the opinion that the proposed amendments are expedient for the expeditious and just hearing and determination of the matter.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, and by consent, hereby directs:

1. THAT Direction 6 and Direction 7 of the Directions that issued on 28 December 2016 ([2016] WAIRC 00968) be deleted and replaced by the following Directions:

   "6. THAT the applicant is to file and serve submissions in full and any list of authorities upon which he intends to rely by no later than Wednesday, 8 February 2017.

   7. THAT the respondent is to file and serve submissions in full and any list of authorities upon which she intends to rely by no later than Wednesday, 22 February 2017."

2. THAT new Direction 8 be inserted:

   "8. THAT the applicant is to file and serve reply submissions, if any, by no later than Wednesday, 1 March 2017.

3. THAT Direction 8 of the Directions that issued on 21 October 2016 ([2016] WAIRC 00840) be deleted and replaced by the following Direction:

   "9. THAT the matter is listed for a one-hour hearing on Wednesday, 8 March 2017.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Corrective Services - Registered Nurses (ANF) Industrial Agreement 2016 AG 51/2016	20/01/2017	The Australian Nursing Federation, Industrial Union of Workers Perth	The Commissioner for Corrective Services for and on behalf of the Minister for Corrective Services	Commissioner T Emmanuel	Agreement registered

NOTICES—Appointments—

2017 WAIRC 00055

DESIGNATION

S 16(2A) INDUSTRIAL RELATIONS ACT, 1979

S 51G OCCUPATIONAL SAFETY AND HEALTH ACT, 1984

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the provisions of s 16(2A) of the *Industrial Relations Act 1979*, hereby designate A/Senior Commissioner SJ Kenner, being a commissioner who holds office under s 8(2)(d) of the Act and who satisfies the additional requirements referred to in s 8(3A) of the Act, to exercise the jurisdiction conferred by s 51G of the *Occupational Safety and Health Act 1984* from 1 February 2017. This designation ceases to have effect on 31 December 2017.

Dated the 1st day of February 2017.

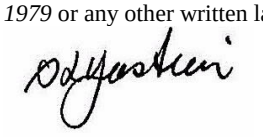
L.S. (Sgd.) P.E. SCOTT

CHIEF COMMISSIONER P.E. SCOTT

2017 WAIRC 00053

Designation of Officers
Section 93(1AC)
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and Pursuant to section 93(1AC) of the *Industrial Relations Act 1979*, **I DESIGNATE**the person nominated, being Sally Leeanne Mason, AS A DEPUTY REGISTRAR to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 13 February – 3 March 2017 inclusive.



SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER

REGISTRAR
DEPARTMENT OF THE REGISTRAR

2 February 2017

2017 WAIRC 00052

Designation of Officers
Sections 85(9) and 99D
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and Pursuant to sections 85(9) and 99D of the *Industrial Relations Act 1979*, **I DESIGNATE** the person nominated, being Sally Leeanne Mason to be the CLERK OF THE COURT for the WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 13 February – 3 March 2017 inclusive.

SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER

REGISTRAR
DEPARTMENT OF THE REGISTRAR

2 February 2017

2017 WAIRC 00054

Designation of Officers
Sections 81D and 99D
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and Pursuant to sections 81D and 99D of the *Industrial Relations Act 1979* **I DESIGNATE** the person nominated, being Sally Leeanne Mason to be the CLERK OF THE INDUSTRIAL MAGISTRATES COURT of Western Australia to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws for the period 13 February – 3 March 2017 inclusive.

SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER

REGISTRAR
DEPARTMENT OF THE REGISTRAR

2 February 2017

2017 WAIRC 00051

Designation of Officers
Sections 93(I) and 99D
Industrial Relations Act 1979

In my capacity as the Chief Executive Officer of the Department of the Registrar within the meaning of section 7 of the *Industrial Relations Act 1979*; and

Pursuant to sections 93(I) and 99D of the *Industrial Relations Act 1979*, **I DESIGNATE**

the person nominated being SUSANE HUTCHINSON to be the REGISTRAR

to exercise the powers conferred under the *Industrial Relations Act 1979* or any other written laws, for the period 13 February – 3 March 2017 inclusive.

SUSAN BASTIAN
CHIEF EXECUTIVE OFFICER

REGISTRAR
DEPARTMENT OF THE REGISTRAR

2 February 2017

PUBLIC SERVICE APPEAL BOARD—

2017 WAIRC 00031

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 25 JANUARY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2017 WAIRC 00031
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T EMMANUEL - CHAIR MR G RICHARDS - BOARD MEMBER MR A LEE - BOARD MEMBER
HEARD	**:**	MONDAY, 12 DECEMBER 2016
DELIVERED	**:**	THURSDAY, 19 JANUARY 2017
FILE NO.	**:**	PSAB 7 OF 2016
BETWEEN	**:**	PAUL EDWARD CHORLEY Appellant AND DIRECTOR GENERAL DEPARTMENT OF TRANSPORT Respondent

CatchWords	**:**	Industrial Law (WA) - Appeal against decision to terminuate employment - Substandard performance - Appeal filed outside of 21 day time limit - Application for extension of time - Board satisfied applying principles that discretion should be exercised - Extension of time granted - Procedural fairness considered - Principles applied - Held performance substandard - Appellant not harshly, oppressively or unfairly dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(n), s 80I *Public Sector Management Act 1994* (WA) s 79, s 79(3)(c) *Industrial Relations Commission Regulations 2005* (WA) reg 107(2)
Result	**:**	*Appeal dismissed*
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr S Barrett and Ms A Tovey

Cases referred to in reasons:

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893

Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Nicholas v Department of Education and Training [2008] WAIRC 01645; (2008) 89 WAIG 817

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (**Board**).

Background

2 Mr Chorley filed an appeal to the Board under s 80I of the *Industrial Relations Act 1979* (WA) (**Act**). He appeals the decision of the Department of Transport (**Department**) to terminate his employment for substandard performance under s 79(3)(c) of the *Public Sector Management Act 1994* (WA) (**PSM Act**).

3 Mr Chorley filed his appeal 85 days out of time.

4 Mr Chorley received pro bono assistance through the Western Australian Industrial Relations Commission Pro Bono Scheme. The Board understands this assistance included advice about his claim and preparation for hearing, including drafting submissions and his outline of evidence.

5 From 10 June 2008 until 21 November 2014 Mr Chorley was employed in the position of Level 7 Manager Freight & Logistics. After 21 November 2014 Mr Chorley was a Level 7 Displaced Officer.

6 On 6 March 2014 Mr Chorley was told by his managers that his performance was not satisfactory and that he would be placed on a Performance Improvement Plan (**PIP**). Several days later, Mr Chorley broke his collarbone and was unable to work for around six weeks.

7 Between 28 May and 20 June 2014, Mr Chorley met with his supervisor, Ms Brits, and the Department's Executive Director Transport Strategy and Reform, Mr Hughes, to develop Mr Chorley's PIP.

8 Between 12 August and 18 December 2014 Mr Chorley had four PIP review meetings with Ms Brits and Mr Hughes. As part of the process, the Department provided Mr Chorley with support and training including a writing course, mentoring and peer review.

9 At the final PIP review meeting, Ms Brits and Mr Hughes told Mr Chorley that his performance was below the standard expected of a Level 7 officer.

10 On 4 March 2015, the Department's Director General wrote to Mr Chorley to start a substandard performance process under the PSM Act. Mr Chorley responded to the Director General and denied that his performance was substandard.

11 On 8 April 2015, the Department appointed an independent investigator to assess whether Mr Chorley's performance was substandard in accordance with s 79(5) of the PSM Act.

12 On 18 December 2015, the independent investigator found:

a. the PIP process was fair and reasonable;

b. Mr Chorley was afforded adequate time and provided with sufficient support in his work; and

c. Mr Chorley's performance was substandard.

13 On 15 January 2016, the Director General wrote to Mr Chorley informing him that his performance was substandard and proposing to terminate Mr Chorley's employment for the following reasons:

a. Mr Chorley's lack of acknowledgment or responsibility for his substandard performance which would likely carry over to any role within the Department.

b. Mr Chorley blaming his management team which led to additional work for them and a breakdown in relations.

c. The seriousness of Mr Chorley's substandard performance including that his written communication skills were below what was expected of a Level 7 position and that his work was grammatically poor with basic spelling errors.

14 Mr Chorley was given the opportunity to respond in writing before a final decision was made.

15 On 20 January 2016 Mr Chorley responded to the Director General. He accepted full responsibility for his conduct and acknowledged that it had not always been appropriate. Mr Chorley accepted that the quality of his work was not of the standard expected of a Level 7 officer. Mr Chorley explained that from 2006 to April 2015 he was being treated for adult attention deficit hyperactivity disorder (**ADHD**). This treatment created anxiety which caused him to react aggressively to stressful situations. The ADHD treatment also made it difficult for him to focus on his work properly which resulted in him making errors. Mr Chorley explained that he had personal stress in his life and had been diagnosed with mild depression in April 2015 which was also when he stopped treatment for ADHD.

16 Mr Chorley did not include medical reports or other evidence to support his statement that he had medical conditions. This was also the first time Mr Chorley had told the Department about his ADHD condition.

17 On 25 January 2016, the Director General wrote to Mr Chorley confirming he had considered Mr Chorley's response. The Director General acknowledged that working with ADHD and mild depression is challenging but did not consider that it was a reason for poor performance over a number of years and it did not change the Director General's view that Mr Chorley's ongoing employment with the Department was not sustainable. The Director General informed Mr Chorley that his employment would be terminated effective 25 January 2016 under s 79(3)(c) of the PSM Act.

18 Mr Chorley asks that the Board adjust the Department's decision to dismiss him and seeks reinstatement or 52 weeks' compensation.

Extension of time

19 Under s 27(l)(n) of the Act, the Board has power to extend the 21 days prescribed by reg 107(2) of the *Industrial Relations Commission Regulations 2005* (WA).

20 Kenner C sets out the principles that apply to extensions of time in Public Service Appeal Board matters in ***Nicholas v Department of Education and Training*** [2008] WAIRC 01645; (2008) 89 WAIG 817 [10]-[14]. When deciding whether to extend the time to commence proceedings, the Board must consider the length of the delay, the reasons for the delay, whether Mr Chorley has an arguable case and whether the Department will be prejudiced by the delay.

21 The Department does not object to the Board granting Mr Chorley an extension of time.

Length of the delay

22 Mr Chorley was dismissed on 25 January 2016. He had 21 days to file his appeal to the Board. Mr Chorley filed his appeal on 11 May 2016, a delay of 85 days. This is a long delay.

Reasons for the delay

23 On 4 February 2016, which was 10 days after he was dismissed, Mr Chorley filed a notice of referral in the Commission in relation to his dismissal (APPL 6/2016).

24 The Board understands Mr Chorley's submission to be that he was confused about which body had the jurisdiction to hear his appeal. He filed APPL 6/2016 contesting his dismissal. He was not aware that the Public Service Appeal Board has exclusive jurisdiction in relation to government officers.

25 Once Mr Chorley understood that he had made a mistake about jurisdiction, he filed his appeal to the Board and discontinued APPL 6/2016.

26 It is not surprising that an unrepresented party would be confused about whether the Commission or the Public Service Appeal Board has jurisdiction to deal with his or her claim.

27 The Board finds Mr Chorley has an acceptable reason for his delay.

Does Mr Chorley have an arguable case?

28 In considering an extension of time to appeal, an assessment of the merits is made 'in a fairly rough and ready way': ***Jackamarra v Krakouer*** [1998] HCA 27; (1998) 195 CLR 516 [9] (Brennan CJ & McHugh J). It would not be unfair to refuse an extension of time if the Board is satisfied that Mr Chorley has no prospect of success.

29 Mr Chorley's notice of appeal, the Department's response and the evidence show issues for determination. Mr Chorley has an arguable case.

Prejudice to the Department

30 Mr Chorley served the Department with his notice of referral in APPL 6/2016 on 8 February 2016, 14 days after his dismissal. That application was broadly the same as his notice of appeal in this matter.

31 So, although Mr Chorley's delay in filing this application was long, the Department could not be said to be prejudiced by Mr Chorley's delay in filing the correct application. In any event, the Department does not object to the Board extending the time for Mr Chorley to file his appeal.

Conclusion on extension of time

32 Given the reason for Mr Chorley's delay, that Mr Chorley has an arguable case and the lack of prejudice to the Department, the Board will extend the time for Mr Chorley to file his appeal to 11 May 2016.

Mr Chorley's grounds of appeal

33 From Mr Chorley's notice of appeal, written submissions, oral evidence and submissions at hearing, the Board understands Mr Chorley's grounds of appeal to include:

a. issues of substantive unfairness:

i. Mr Chorley's performance was not sufficiently substandard to justify termination;

ii. a number of personal issues contributed to Mr Chorley's performance;

iii. the extensive length and quality of Mr Chorley's service was not adequately considered;

iv. Mr Chorley's work was adversely affected by the workplace culture; and

v. Mr Chorley had no immediate prospect of employment within the Public Sector; and

b. issues of procedural unfairness:

i. Mr Chorley's PIP process lacked procedural fairness:

1. Mr Chorley was not given a Job Description Form (**JDF**) after 21 November 2014;
2. the PIP document was not updated;
3. the PIP process lacked positive direction;
4. Mr Chorley and Ms Brits had a poor relationship; and
5. the PIP process should not have involved both Ms Brits and Mr Hughes; and

ii. Mr Chorley was not given the opportunity to show his improvement after the PIP process and before his employment was terminated.

The test to be applied

34 The test to be applied in a claim of harsh, oppressive or unfair dismissal is whether the employer has abused its right to dismiss: ***Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385.

35 A dismissal might be unfair for a range of reasons. EM Heenan J in ***Garbett v Midland Brick Company Pty Ltd*** [2003] WASCA 36; (2003) 83 WAIG 893 states:

> 72 Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees. Where misconduct is alleged or relied upon there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances. Factors such as these going to the reasons for the particular dismissal are frequently referred to in the authorities in this area as matters of 'substantive' fairness, as opposed to issues of 'procedural' fairness which relate to the manner in which the employee was notified of the proposed termination, what opportunity, if any, he or she was given to respond and the time and method employed in effecting the termination. This distinction between substantive and procedural issues going to the question of whether or not a particular dismissal was harsh, oppressive or unfair can be useful in certain cases but it entails the danger of regarding the statutory test as having separate application and different meanings in different contexts. Such an approach must be rejected because, however the issue may arise, the decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be applied without any gloss. For a criticism of how the distinction between procedure and substance in this area is elusive and how it may be unhelpful and contrary to the true meaning of the statutory phrase, see McHugh and Gummow JJ in ***Byrne & Frew v Australian Airlines Ltd*** (*supra*) at 465.
>
> 73 In this State a test which has been adopted by the Commission, and approved by this Court, is to consider whether the dismissal amounted to an abuse of an employer's right to dismiss thus rendering the dismissal harsh or oppressive - ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635; ***Miles v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous (WA) Branch*** (1985) 17 IR 179; 65 WAIG 385, IAC and ***Robe River Iron Associates v The Association of Draughting, Supervisory and Technological Employees, WA Branch*** (1987) 76 WAIG 1104, IAC. In cases where the alleged harsh, oppressive or unfair nature of the dismissal relates to the procedure followed by the employer in effecting the termination of employment it has been held in this State that a failure to adopt a fair procedure by the employee can lead to a finding that the dismissal was harsh, oppressive or unfair - ***Bogunovich v Bayside Western Australia Pty Ltd*** (*supra*), but a lack of procedural fairness may not automatically have this result - ***Shire of Esperance v Mouritz (No 1)*** (1991) 71 WAIG 891 IAC (original emphasis).

Mr Chorley's case

Substantive unfairness

36 Mr Chorley says that performance issues were not raised with him before 2014. Most of his work was program work and not policy work. Mr Chorley says his performance was not sufficiently substandard to justify termination. Much of Mr Chorley's argument focused on his perception that his program work was good and that he was not told it was substandard. Mr Chorley gave evidence that his managers agreed with his self-evaluation in his performance appraisal about what went well. In cross-examination Mr Chorley conceded that his managers listed areas for improvement, which included:

a. 'Ability to identify key issues to respond to'.

b. 'Ability to judge what information is required for an appropriate response'.

c. 'Ability to clearly articulate appropriate responses (i.e. need to present a cohesive piece of written work; not provide irrelevant information; avoid repetition, not have [a] significant number of spelling and grammatical errors). Written work submitted is regarded by management as consistently of poor quality'.

d. 'Ability to develop policy concepts, scope project outlines, structure and develop research reports to an acceptable standard'.

e. 'Ability to respond to requirements in appropriate timeframes'.

f. 'Ability to accept and follow management direction'.

37 Mr Chorley says that policy work was introduced to his position in late 2013. He was not familiar with it and it involved a different skill set. Mr Chorley argues that policy work increased the scope of competencies required of him and placed demands on his time. Mr Chorley explained several times that the two involve different skills and ways of working. He found it difficult to do policy work and program work. He says 'it's not normal to have expertise in both skill sets'.

38 In cross-examination, Mr Chorley conceded that his JDF refers to policy work under the key responsibilities and also in the list of duties:

> **KEY RESPONSIBILITIES**
>
> **The Manager Freight & Logistics:**
>
> - manages the day to day operations of the freight and logistics team
> - *develops, implements and evaluates transport freight and logistics policy*
> - *provides strategic advice about transport freight and logistics policy*
> - promotes the transport freight and logistics objectives of the Department
>
> **DUTIES**
>
> **…**
>
> **6. Role Specific**
>
> - *Plans, undertakes and manages research and analysis for examining transport freight and logistics, policies, strategies and programs.*
> - *Advises and makes recommendation in relation to transport freight and logistics policies, strategies and plans.*
> - *Consults with internal and external stakeholders at a senior level in the formulation and implementation of transport freight and logistics policies, strategies and plans.*
> - Maintains senior networks with key community, industry and Government stakeholders.
> - Represents the Department at a senior level in forums and on working groups and committees.
> - Participates in and contributes to corporate management and development activities for the branch, directorate and division.
> - Leads and/or participates in project teams to implement the Department's work program.
> - Develops briefs, directs and oversees the work of consultants engaged to undertake specific studies.
> - Promotes the Department's objectives.
>
> (emphasis added)

39 In cross-examination Mr Chorley agreed the advertisement for his position also notes that policy work is a requirement:

> **Department for Planning and Infrastructure**
>
> Policy Group - Transport Industry Division
>
> Manager Freight & Logistics
>
> …
>
> **Job Description**
>
> The Department for Planning and Infrastructure is seeking a Manager Freight & Logistics to join our Transport Industry Policy Division.
>
> In this role, you will:
>
> - Assist the Director in managing the day to day operations of the freight and logistics team.
> - *Develop, implement and evaluate transport freight and logistics policy.*
> - *Provide strategic advice about transport freight and logistics policy.*
> - Promote the transport freight and logistics objectives of the Department.
>
> (emphasis added)

40 Mr Chorley argues that his performance improved. The Board understands Mr Chorley's submission to be that he measured his performance empirically by analysing changes to his work made by others and using Microsoft's word count function to assess the number of changes. In cross-examination, Mr Chorley confirmed the Department provided him with training. He did a writing course, he worked with senior staff and underwent peer review. Mr Chorley gave evidence that after he had done the writing course, he made grammatical recommendations to Ms Brits about her work. In cross-examination, Mr Chorley did not dispute that his letter to the Director General responding to the allegation that his work was substandard was full of grammatical mistakes and contained incorrect information.

41 Mr Chorley says that personal issues contributed to his poor performance. He had experienced the stress of building a new home, a marriage breakdown and was on medication for adult ADHD. Mr Chorley gave evidence that he told the Director General about these matters on 20 January 2016. He did not raise it before then because he felt uncomfortable.

42 Mr Chorley says that the length and quality of his service should have been taken into account.

43 Mr Chorley says that his work was adversely affected by the workplace culture. He did not provide evidence of this other than to say he found Ms Brits' communication style and involvement in his performance management to be challenging.

44 Mr Chorley argues that his job prospects are non-existent within the Public Sector because of the job freeze and there is no immediate prospect of other employment.

Procedural unfairness

45 After Mr Chorley's position was displaced in November 2014 he was not given a new JDF. As a result, his PIP lacked clear direction. Mr Chorley says a PIP requires a JDF. In cross-examination Mr Chorley confirmed that he was given a Public Sector Commission capability profile for a Level 7 officer (**Level 7 capability profile**). Mr Chorley argues that he did not know what objectives he was trying to achieve when his position was displaced.

46 In essence, Mr Chorley argues that he was told he was substandard for a Level 7 Policy Officer but he only had a JDF for a Level 7 Manager Freight & Logistics position. He says he did not understand what were the duties of a Level 7 officer because he did not have a JDF.

47 Mr Chorley says that his performance improvement document was not updated after June 2014. He says he did training and achieved the standards in the PIP but that was not recorded.

48 Mr Chorley says that the PIP lacked positive direction. Instead of meeting fortnightly as outlined in the PIP document, he had four PIP meetings with Mr Hughes and Ms Brits.

49 Mr Chorley says he had a poor relationship with Ms Brits. They did not communicate well and Ms Brits tended to communicate with him in writing. As a result of this he and Ms Brits went to counselling.

50 Mr Chorley says that it was unhelpful having both Ms Brits and Mr Hughes at PIP meetings. He argues they made no real effort to assess his progress properly. They wanted to follow the PIP policy and complete the PIP process within four months. Mr Chorley says their approach was subjective and the PIP did not help him.

51 Mr Chorley argues that he should have been given the opportunity to show his improvement after the PIP process and before his termination.

52 Mr Chorley says he has significant skills on the operational side and no one tried to find him an operational position.

The Department's case

53 Mr Hughes gave evidence for the Department.

54 The Department says that Mr Chorley was employed as a Level 7 officer in a position that involved policy and program work. Level 7 is a reasonably senior level and involves high expectations.

55 Mr Hughes gave evidence that by 2014 he was concerned about Mr Chorley's performance. Along with Ms Brits he concluded that Mr Chorley's standard was not at a Level 7 based on his JDF, the Public Sector Commissioner's capability framework and Mr Hughes' observations of other Level 6 and Level 7 officers. As a result, the Department put Mr Chorley on a PIP to try to improve his performance to that expected of a Level 7 officer. The JDF Mr Chorley was employed under was used during the PIP process.

56 The Department says the PIP process clearly revealed the areas where Mr Chorley was not meeting expectations and the Department assisted him to obtain the skills, for example by providing training and peer review. By the end of the PIP process, Mr Chorley's performance had not improved and he was not performing to the level expected of a Level 7 officer.

57 Mr Hughes gave evidence that Mr Chorley's work was not completed within appropriate timeframes or to the required standard. When Mr Chorley was told his performance was substandard, he appealed the PIP process. Mr Hughes gave evidence that an independent investigator concluded that the PIP process was fair and reasonable and that Mr Chorley had the opportunity to demonstrate his performance. The independent investigator dismissed Mr Chorley's appeal and found his performance to be substandard.

58 Mr Hughes gave evidence about why there were fewer meetings during the PIP process than anticipated. He said the process started later because Mr Chorley broke his collarbone and as a result was away from work for about six weeks. Mr Hughes was a bit concerned about interactions between Ms Brits and Mr Chorley. Their communication styles did not work well together so Mr Hughes thought it would be fair for him to also be involved. Mr Hughes was away on leave from August to September. As well as the four PIP meetings, there were many more general management meetings with Mr Chorley.

59 Mr Hughes gave evidence that Mr Chorley never mentioned to him that he suffered from ADHD or depression. Mr Chorley only mentioned in December 2014 or January 2015 'something about dyslexia'.

60 Mr Hughes gave evidence that he did not think it was necessary to update the PIP document. Mr Hughes said that Mr Chorley's effort and attitude toward his work improved after the PIP process but his performance was still substandard. Mr Hughes gave the example of Mr Chorley being asked in January 2015 to complete a task which should have taken him about one month. Mr Chorley finished this task in August 2015 and it required significant re-working. Most of Mr Chorley's work is now being done by a Level 5 officer who works three days per week.

61 Mr Hughes gave evidence that Mr Chorley's position should always have involved significant policy work. Mr Chorley was not given as much policy work as his managers would have liked because Mr Chorley did not respond well to it. Over time some of Mr Chorley's project work naturally diminished because it involved a temporary package or because the programs operated well and therefore did not need more development. Mr Hughes gave evidence that policy and program work do involve different skill sets but that officers can manage both.

62 The Department says its performance management policy does not require a PIP process to be completed before going through the process to dismiss an employee for substandard performance under s 79 of the PSM Act. The Department chose to go through the PIP process to be fair and to assist Mr Chorley. After Mr Chorley disputed that his performance was substandard, the Department arranged for an independent investigation. The independent investigator found that Mr Chorley's performance was substandard. The Director General of the Department wrote to Mr Chorley, proposing to terminate Mr Chorley's employment for the reasons set out at [13].

63 Mr Chorley admitted his substandard performance in his response to the Director General and conceded that his performance was not at the standard expected of a Level 7 officer. The Department says that the Director General considered Mr Chorley's response and decided to terminate his employment.

64 The Department says it is regrettable that Mr Chorley did not bring his medical issue to the Department's attention until the very end of the process, however it was considered by the Director General. The Department did everything it could to turn Mr Chorley's performance around. Mr Chorley's performance was substandard and the Department followed a fair process.

Consideration

65 The onus is on Mr Chorley to persuade the Board to adjust the Department's decision to dismiss Mr Chorley for substandard performance.

66 Mr Chorley appeared at times to have poor comprehension and not to understand or accept what was being asked of him. For example, during the hearing the Board had to remind Mr Chorley six times about a relatively simple instruction the Board had given him. Some of Mr Chorley's evidence in cross-examination was inconsistent with his earlier evidence.

67 Mr Hughes was a credible witness. His evidence was not disturbed in cross-examination and the Board accepts his evidence. Where Mr Chorley's evidence conflicts with Mr Hughes' evidence, the Board prefers Mr Hughes' evidence.

68 Mr Chorley's period of service with the Department is reasonably long. The Board accepts, as the Department seemed to, that Mr Chorley's program work was not necessarily of a poor standard. But that does not show that Mr Chorley's performance overall was of a standard expected of a Level 7 officer. Based on the exhibits, Mr Hughes' evidence and the conclusions reached by the independent investigator, the Board finds that the Department's expectation about performance was reasonable. A Level 7 officer should be able to produce work to a high written standard and to manage interruptions. Mr Hughes' evidence that Mr Chorley's performance was substandard was consistent with the independent investigator's report. Mr Chorley's focus throughout the hearing and in his written submissions was on the quality of his program work. Mr Chorley did not give evidence or make submissions about the independent investigator's conclusion that his performance was substandard. Mr Chorley did not challenge Mr Hughes' evidence which conflicted with his own evidence, even though the Board told Mr Chorley twice that if he wanted the Board to accept his evidence, Mr Chorley would need to challenge Mr Hughes about the aspects of Mr Hughes' evidence that conflicted with Mr Chorley's evidence.

69 The Board accepts that Mr Chorley's policy work was poor and that this led to Mr Chorley being asked to do less policy work. The Board also accepts Mr Hughes' evidence that the nature of Mr Chorley's work changed over time. However, policy was always a part of Mr Chorley's position. That much is clear from the JDF he was employed under (Manager Freight & Logistics) and the advertisement for this position. An employer is entitled to expect its employees to perform the duties of their position at the required standard. Mr Chorley was given the opportunity to take part in a PIP process. Though it may have been better had Mr Hughes and Ms Brits scheduled and attended more regular meetings, the Board finds based on the evidence of Mr Hughes and the exhibits, that the PIP process was fair and reasonable. At the end of that process Mr Chorley's performance was substandard. As it was entitled to do, the Department initiated the substandard performance process under s 79 of the PSM Act. The Board accepts that an independent investigator found that Mr Chorley's performance was substandard. Mr Chorley did not challenge the independent investigator's report or call him as a witness.

70 Based on the evidence of Mr Hughes and Mr Chorley and the exhibits, the Board finds Mr Chorley's performance was substandard.

71 The JDF for Mr Chorley's Level 7 Manager Freight & Logistics position was used during his PIP process and after Mr Chorley's position was displaced, the Level 7 capability profile was used. Mr Chorley's PIP set out clear expectations and referred to the Level 7 capability profile. It should have been clear to Mr Chorley what the Department expected of him.

72 Mr Chorley complained that having Mr Hughes and Ms Brits involved in his PIP process was unhelpful. However, the Board accepts Mr Hughes' evidence that the reason Mr Hughes was involved is because of the communication difficulties between Mr Chorley and Ms Brits. It is regrettable that Mr Chorley and Ms Brits had difficulty communicating with one another. At its highest, Mr Chorley's evidence and submission seemed to be that he and Ms Brits did not get along well and he did not like that she preferred to communicate with him in writing. The Board does not accept that Mr Chorley's work was adversely affected by the workplace culture. Mr Chorley has not persuaded the Board that Ms Brit's involvement in his PIP process was unfair. The Board finds that it was reasonable in the circumstances for Mr Hughes and Ms Brits to be involved in Mr Chorley's PIP process.

73 The Department's practice would have been better if it had not planned for fortnightly meetings that it did not hold and if it had updated Mr Chorley's PIP document. However, Mr Chorley's general criticism of the Department for following its policy and completing the PIP process within four months is unwarranted. Too often employers take too long to complete performance management processes. The Board finds Mr Chorley was given a reasonable opportunity, a reasonable timeframe and reasonable support to improve his performance.

74 Mr Chorley referred to his poor job prospects within the Public Sector due to a recruitment freeze. He did not provide any evidence about his general prospects of employment. In circumstances where the Board accepts that Mr Chorley's performance was substandard, it is unreasonable to expect the Department to continue to employ Mr Chorley because his job prospects are poor.

75 Mr Chorley has not persuaded the Board that his performance was other than substandard or that the termination process was unfair. The Department complied with the rules of procedural fairness in finding Mr Chorley's performance was substandard and deciding to dismiss Mr Chorley. The Board finds that the Department has not abused its right to dismiss Mr Chorley.

76 Mr Chorley's appeal should be dismissed.

2017 WAIRC 00032

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 25 JANUARY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL EDWARD CHORLEY
	APPELLANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR G RICHARDS - BOARD MEMBER
	MR A LEE - BOARD MEMBER
DATE	THURSDAY, 19 JANUARY 2017
FILE NO	PSAB 7 OF 2016
CITATION NO.	2017 WAIRC 00032

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr S Barrett

Order

HAVING HEARD Mr P Chorley on his own behalf and Mr S Barrett and Ms A Tovey on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2017 WAIRC 00030

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 29 AUGUST 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN ROSS MACK
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF PARKS AND WILDLIFE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL - CHAIR
	MR G LEE - BOARD MEMBER
	MR N PURDY - BOARD MEMBER
DATE	THURSDAY, 19 JANUARY 2017
FILE NO	PSAB 18 OF 2016
CITATION NO.	2017 WAIRC 00030

Result	Appeal dismissed
Representation	
Appellant	Mr D Stojanoski
Respondent	Ms M Marsh

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 11 November 2016 the Public Service Appeal Board convened a directions hearing;

AND WHEREAS on 9 January 2017 the appellant filed a Notice of Withdrawal or Discontinuance in respect of the appeal;

NOW THEREFORE the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this appeal be and is hereby dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2017 WAIRC 00069

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

CITATION	**:**	2017 WAIRC 00069
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 17 JANUARY 2017
DELIVERED	**:**	FRIDAY, 10 FEBRUARY 2017
FILE NO.	**:**	RFT 29 OF 2015
BETWEEN	**:**	STEVE BURKE TRANSPORT PTY LTD
		Applicant
		AND
		TOLL TRANSPORT PTY LTD T/AS TOLL IPEC
		Respondent

CatchWords	**:**	Owner-driver contract - Referral of dispute - Early termination of contract - Reasonable notice - Holding over of contract - Estoppel from pleading matters contained in previous Deed of Settlement - Fixed term contract - Renewal of contract
Legislation	**:**	*Owner-Drivers (Contracts and Disputes) Act 2007*
Result	**:**	Application granted
Representation:		
Applicant	**:**	Mr W Spyker of counsel
Respondent	**:**	Ms C Vinciullo of counsel and Mr D Fletcher of counsel

Reasons for Decision

1 The dispute in this matter is that Steve Burke Transport Pty Ltd says that:

1. The respondent, Toll, made a representation that it would contract with Steve Burke Transport for a minimum of five years. Steve Burke Transport relied on the representation to its detriment.
2. The contract between the parties provided for a year's term, to be renewed each year. Toll terminated the contract contrary to that arrangement.

2 Toll says that:

1. Steve Burke Transport is prevented from pursuing this matter in relation to the representation because of a Deed entered into by Mr Steven Burke and Toll in resolution of a matter before the Tribunal in 2013, in RFT 2 of 2013.
2. The two propositions by Steve Burke Transport, set out above, are incompatible.
3. It denies making the representation.
4. It denies the interpretation of the contract put forward by Steve Burke Transport that the contract was to be renewed each year. Rather, it says that at the end of the contract, after one year, the contract was held over, and that it could be terminated on reasonable notice.

3 For the following reasons, I have decided that:

1. The contract was yearly, and expired on the last working day of June each year. It provided for renewal at the end of each contract. There is no provision for reasonable notice. If Toll sought to terminate before the last working day in June 2016, it is required to pay damages to cover the unexpired period.
2. Steve Burke Transport is estopped from asserting that there was a representation that Toll would contract with him for a minimum of five years due to the Deed entered into with Toll in 2013. However, this has no effect on the outcome of this matter. This is because the contract was renewed each year for four years, and the completion of the contract, had it not been terminated by Toll, would take the duration, in total, to five years.

Background

4 Steven Paul Burke is the sole director of Steve Burke Transport, a company registered on 22 June 2011. Mr Burke was an employee of Toll from 20 August 2008 until he and Toll entered into an owner-driver contract. As an employee, Mr Burke undertook delivery driver duties in the Canning Vale area using a truck provided by Toll.

5 Mr Burke says that in 2011, he became aware that Toll was looking for drivers to contract on a piece rate payment basis. He was aware of two Toll drivers in Perth who were on a 'contractor piece rate payment arrangement', one of whom, Neil Smith, had been on the arrangement for seven years.

6 Mr Burke says that in March 2011, he spoke with Toll's WA State Operations Manager, Tony Consedine, about whether it was possible for him to go onto the piece rate arrangement and whether the Canning Vale run was 'up for grabs'.

7 Mr Burke says that Mr Consedine told him that there was a piece rate arrangement and that he could have the Canning Vale run because he was already doing it. He and Mr Consedine discussed the issues in about three or four brief discussions over April and May 2011.

8 Mr Burke says that in a particular meeting in around mid-May 2011, in Mr Consedine's office, Mr Consedine confirmed that the Canning Vale run was his. He says that Mr Consedine 'looked me in the eye and said that being a contractor was a big commitment and that it was not short term but was for a minimum of five years. He asked whether my body would be up for it'.

9 Mr Burke says that he replied that he 'was up for it and would commit to that'. He said that if he entered into a contractor arrangement, he would have to take out a loan to buy his own truck because he did not have the money to buy one outright. They then discussed payment rates and how he would come to Mr Consedine at the start of each year to discuss rates.

10 Mr Burke says that he took out a loan to purchase a truck. He says he chose the term of the loan to be five years because of what Mr Consedine had said to him, that the commitment to the contractor arrangement with Toll would be a minimum of five years.

11 Mr Burke says that in early July 2011, he had discussions with Mr Brian Green, Toll's Operations Manager, about the actual piece rates that would apply. He says that on 15 June 2011, he was given the owner-driver contract, headed 'Metropolitan Agent Agreement' (the MAA). He says that when he read the document, he refused to sign it because it stated that it was a contract for one year and that meant he 'could become unemployed on 1 July 2012'. He says he returned to Mr Green and said that he could not sign it on that basis. He says Mr Green told him not to worry because the contract rolled over each year, as with Neil Smith and Peter Cook, for seven and four and a half years respectively.

12 The next day, 16 June 2011, Mr Burke signed the contract. That day, he purchased the truck. On 22 June 2011, he registered Steve Burke Transport Pty Ltd. On 28 June 2011, he entered into a finance agreement for a loan for the purchase of the truck over a five year term. He resigned from his employment with Toll and he worked for Toll under the MAA. He was paid according to invoices submitted by him in accordance with the MAA.

13 Mr Burke says he would not have resigned, purchased the truck and taken on the loan unless he had received Mr Consedine's word that the commitment to the piece rate arrangement would be for a minimum of five years.

Proposal to reduce piece rate

14 In May 2012, according to Mr Burke, Toll informed him that it was reducing his piece rate. He objected. Following a number of meetings, a Mr Muller advised all the contractors that the rate would not change, and the rate remained as set out in the MAA.

2013 dispute

15 Mr Burke says that in January 2013, he was told that one of his major customers in Canning Vale would no longer be included in his Canning Vale run. He referred that matter to the Tribunal in RFT 2 of 2013. He says the matter was settled by

agreement, reflected in a Deed, by which the customer was removed from his Canning Vale run and Toll paid him a lump sum settlement.

Notice of termination

16 On 20 July 2015, Steve Burke Transport received a letter from Toll giving notice that it was terminating the MAA effective from 11 September 2015. Through its solicitors, Steve Burke Transport wrote to Toll affirming the MAA and seeking specific performance until 30 June 2016, when the five year arrangement would expire.

17 On 8 September 2015, Toll wrote to Steve Burke Transport's lawyers, stating that it had lawfully exercised its contractual right to terminate the MAA with reasonable notice. On 10 September 2015, Toll provided to Mr Burke a copy of a proposed new agreement titled 'Independent Contract or Agreement'. He did not agree to the rates and the terms of the proposed new agreement and rejected it.

18 Mr Burke did not commence seeking alternative work until after 11 September 2015 because he did not know that the contract would come to an end until he 'was actually marched out the door'.

Mr Consedine's evidence

19 Mr Anthony John Consedine was employed by Toll between 1984 and 2014. In 2014, he was the WA Operations Manager.

20 Mr Consedine says that Toll informally, through word of mouth around the yard, indicated that it would enter into piece rate arrangements with drivers. He was not approached by Mr Burke, nor did he approach Mr Burke, to discuss Mr Burke leaving Toll's employment to become a subcontractor owner-driver for Toll's operations in the Canning Vale area. He says that ultimately, Mr Brian Green arranged Steve Burke Transport's engagement with Mr Burke.

21 Mr Consedine says that he did not make any statements or representations to Mr Burke that Toll would enter into a fixed term contract of not less than five years. He says he does not remember having any discussions with Mr Burke in his office, about the contractual arrangements, that Mr Burke says they had. He says that it was his practice, and the practice of Toll, to make 12 month contracts with owner-drivers, the same period as was expressed in Mr Burke's contract. He says that the reasons Toll enters into 12 month engagements with owner-drivers are:

1. It provides flexibility so that Toll and its owner-drivers can assess the commercial viability of the arrangement on a regular basis to determine whether it meets the needs of both of them; and
2. Such arrangements are a normal aspect of the industry Toll operates in. There is no ability to determine or guarantee that there will be sustainable work for an owner-driver over a long period. He says that Toll is a client-driven business that operates in a competitive market which sees work peak and trough regularly, and that it would be uncommercial for both Toll and its owner-drivers to have long term engagements as volumes of work may decline unexpectedly. This is why a 12 month engagement is entered into, to offset the uncertainty of the industry.

22 Mr Consedine says that at the expiry of each 12 month period, contracts are held over until such time as either Toll or the owner-driver wishes to terminate the engagement. Terminations are on the giving of reasonable notice by Toll, or by mutual agreement between the owner-driver and Toll.

23 Mr Consedine also says that at the end of a 12 month period, owner-drivers would speak to him or another representative of Toll and seek an increase in the cartage rates they are paid. Toll would consider these requests and, if agreed, a new rate schedule is set and is understood to operate during the holdover period of the contract. He says that a new contract is not entered into; rather, the rates paid change.

24 Mr Consedine says that during his time with Toll, he managed over 160 country agents around Western Australia who were engaged on identical terms to Mr Burke, and that all other Perth local owner-drivers were engaged on 12 month contracts and operated pursuant to the same conditions and arrangements as Mr Burke. He says, in that sense, Mr Burke's engagement was not unique.

Mr Warwick's evidence

25 Wayne Anthony Warwick commenced employment with Toll IPEC Pty Ltd in May 2009 as the country manager. In 2014, he became the WA Operations Manager.

26 Mr Warwick gave evidence about the general approach taken by Toll towards negotiations with owner-drivers, some of the history associated with Mr Burke's and others' engagements and terminations as contractors, and of the commercial circumstances relating to the contractual arrangements.

27 He also gave evidence of communication with Mr Burke and his lawyers in the attempts to resolve this dispute. This included that Mr Burke was offered an hourly rate contract arrangement. Given the size of his vehicle and the volume of the work he could perform, he would have received $55 per hour under this proposal. However, Mr Burke was unwilling to accept any change prior to mid-2016.

28 Mr Brian Green, who Mr Burke says assured him that the five year arrangement would apply immediately prior to his signing the agreement, and who Mr Consedine says dealt with Mr Burke over the contract arrangements, did not give evidence.

The contract

29 The MAA was signed and dated 30 June 2011. It is a very simple contract, in the following terms:

METROPOLITAN AGENT AGREEMENT

This agreement between Toll-IPEC as the Prime Contractor and Steve Burke as the Metropolitan Agent establishes a contractual relationship for the purpose of the collection and delivery of items of freight for customers of the Prime Contractor.

To recognise the self employed status of the Metropolitan Agent this agreement is based on productivity and retention of customers by providing such service that will meet the quality expectation of the customers.

In this regard the following payments will apply:

Minimum Weekly Earnings (Pro Rata)	$1750.00
Remuneration per item/carton	$2.00
Remuneration per connote	$Nil
Remuneration per kilogram	$Nil
Remuneration per pallet	$20.00 flat rate
Remuneration per satchel	$2.00

All consignments to be cubed and weighed

All payments to the Metropolitan Agent will be weekly by direct deposit.

The rate shown above will be fixed from the date hereof and is based on the Metropolitan Agent providing a vehicle and driver for all days not declared holidays.

The agreed type and condition of vehicles, individual presentation and the handling of documentation shall be such to enhance further business of each party to this contract. The Metropolitan Agent shall be responsible for all necessary insurance, statutory obligations, worker's compensation, and hazardous goods cover.

All work remains the property of the Prime Contractor and under no circumstances can:-

a) The run be sold

b) A vehicle be sold with the rights to the run

Goodwill remains the property of the Prime Contractor

This contract shall expire on the final working day of June 2012 or by mutual agreement. If the parties mutually agree to renew this contract, the Metropolitan Contractor will have first option to renew the contract subject to a satisfactory review of the payments.

Dated 30.06.2011

Signed for and on behalf of Toll-IPEC [signed] WA State Operations Manager

Signed: [signed] Metropolitan Agent

Issues and consideration

Naming of applicant

30 The MAA sets out that it is an agreement between Toll IPEC and Steve Burke. The dispute that was referred to the Tribunal in 2013 had as its applicant the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (the TWU). The Deed of Release in respect of the 2013 dispute is between Toll Transport Pty Ltd t/as Toll IPEC and Stephen Burke. The parties to that dispute are referred to in the Deed of Release as being Toll IPEC and Stephen Burke. The background to the Deed describes Mr Burke as being a contractor. (I also note in passing that in the 2013 referral, both the TWU in its *Notice of referral* and Toll in its *Notice of answer* referred to the applicant as being Mr Burke when it was the TWU.)

31 Neither party raised the issue that this application is made by Steve Burke Transport Pty Ltd not by Mr Steve Burke personally, who is the party to the MAA and the Deed.

32 As neither party has raised the issue of the separation of the corporate identity of Steve Burke Transport Pty Ltd and Stephen Burke it is my intention to treat Mr Burke and Steve Burke Transport Pty Ltd as one entity, albeit that, strictly speaking, they are not. I think in the circumstances, it would be contrary to the intention of the parties in the way in which they have argued the matter and contrary to equity and good conscience to make that formal separation.

33 Therefore, whilst I refer in these reasons to both Mr Burke, who is the sole director of Steve Burke Transport, and to him as a natural person, it should not be thought that there is any significance in the distinction between those two for the purposes of this matter.

The 2013 dispute

34 As I have noted above, in 2013, the TWU referred a dispute to the Tribunal by a *Form 7A – Notice of referral to the Road Freight Transport Industry Tribunal* in RFT 2 of 2013. The dispute was described on the Form 7A as being between 'the TWU on behalf of Stephen Burke … and [Toll]'. The attached schedule sets out 18 paragraphs dealing with the contract said to be between Mr Burke and Toll, and an allegation of a breach of the contract. The schedule sets out as part of the background that:

> 5. The Contract was stated to be for a period of 12 months, however, the Contract has continued beyond that 12 month period, and is an ongoing contract. Further, the respondent, through Mr Consadine[sic], represented to the Applicant and to the Applicant's Bank that the Contract was for a term of five (5) years.

35 Therefore, the TWU said in that matter that the contract was ongoing and that Toll represented that it would be for a term of five years.

36 The further detail set out that Toll had sought to unilaterally vary the contract by the removal from Mr Burke's run of a particular customer, Blackwoods, which made up a significant proportion of Mr Burke's Canning Vale run. It alleges that in the contract being established, Toll had represented to Mr Burke that Blackwoods would be included in his run. Therefore, the removal of Blackwoods would constitute a breach of the contract. The TWU sought damages for loss of income to Mr Burke.

37 Toll filed a *Form 5 – Notice of answer*. It deals mainly with the issues of services provided by its drivers, including the logistics of services to the particular client, Blackwoods; Mr Burke's services; payments made; Mr Burke's customer run and the rates of pay.

38 Toll's answer also addresses the question of the term of the agreement by answering those paragraphs of the *Form 7A – Notice of referral*, including paragraph [5] referred to above. In paragraph 17 of its *Notice of answer*, Toll says that:

> The Agreement [that is, the MAA] reflects the key components of the understanding between the Applicant and Toll (as the Prime Contractor), namely that:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) the term of the Agreement would initially be 12 months.
>
> 18. There was an understanding between Toll and the Applicant that:
>
> (c)[sic] the Applicant would continue to service the Canningvale area; and
>
> (d) by mutual agreement between the parties, the Agreement may be renewed.
>
> 19. There is no term in the Agreement, and there was otherwise no understanding between the Applicant and Toll, that requires Toll to allocate a particular route and/or customer (including but not limited to Blackwoods) to the Applicant.

39 The dispute was the subject of conciliation by the Tribunal. It was then set down for hearing, however, the parties reached agreement and the agreement was reflected in a Deed. The Deed is between Toll Transport Pty Ltd trading as Toll IPEC and Stephen Burke. A clause headed '*Background*' includes:

> Mr Burke is [a] contractor who provides freight collection and deliveries (**Services**) to Toll IPEC pursuant to a piece rate sub-contractor agreement with Toll IPEC dated 30 June 2011 (**Agreement**). The Agreement is an "owner-driver contract" within the meaning of that term in section 5 of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA).
>
> Exhibit R1

40 Part B of **Background** deals with the services provided by Mr Burke, in particular, that they were predominantly in the Canning Vale area.

41 The next clause is headed '**Agreed Terms**'. It includes definitions, the first of which is '**Claim(s)**' which, according to the Deed, means:

> any action, claim, proceeding, demand, suit, complaint, dispute, any of the matters pleaded in the Application, liability, sum of money, damages and cost no matter how the same arose and on every count which now exist, may exist or which but for this Deed exist at the date of this Deed regarding the Agreement and performance of the Services including the Dispute and the matters pleaded in the Application either at law or in equity or arising under a statute.

42 Clause 2 – **Settlement** provides that Mr Burke agrees to discontinue the proceedings by signing and dating the Notice of discontinuance and filing it; the Deed was to be executed and returned to Toll, and that at a certain point, a sum of money would be paid to him by Toll.

43 Clause 3 – **Release and Discharge** provides:

> **3.1 Mutual release**
>
> The parties to this Deed unconditionally release and discharge each other and, where applicable, any Related Bodies Corporate and their associates, directors, employees, servants, agents, shareholders, assigns and insurers from the Dispute, *the matters pleaded in the Application and all Claims which exist now or which but for this Deed would exist in relation to the Dispute or any of the matters pleaded in the Application annexed to this Deed.* (Emphasis added)
>
> **3.2 Mr Burke**
>
> *Mr Burke acknowledges that he has no further Claims regarding the Agreement and will not make any such Claims against Toll IPEC.* (Emphasis added)
>
> Exhibit R1

44 These clauses do not identify the particular issues the subject of the dispute, other than by reference to the matters pleaded in the referral.

45 Clause 7 – **General**, subclause 7.1 – **Warranties** says that the Agreement under which Mr Burke provides services to Toll, being what is referred to in these proceedings as the 2011 MAA, (which was defined in Part A of **Background** as the owner-driver contract) 'is the entire agreement between the parties regarding the Services and the Canning Vale Run'.

46 In this way, the Deed recorded that the dispute between the parties that was referred to the Tribunal in RFT 2 of 2013, *including the matters pleaded in the referral*, was settled by the parties in their Deed.

47 Subclause 7.2 – **Bar to Proceedings** says:

> This Deed may be pleaded as a full and complete defence by Toll IPEC, its Related Bodies Corporate and their associates, directors, employees, servants, agents, shareholders, assigns and insurers, including as a bar to any Claim or action commenced, continued or taken by or on behalf of Mr Burke in connection with any of the matters referred to in this Deed.
>
> Exhibit R1

48 Therefore, the matter settled by the Deed included the pleading in relation to the Agreement (that is, the MAA) being an 'ongoing contract' (Form 7A, clause 5) and that Toll 'through Mr Consedine, represented to the Applicant and to the Applicant's bank that the Contract was for a term of five (5) years', and the parties agreed that the MAA was the entire agreement.

49 According to the Deed, all of those matters were settled and the parties released each other in respect of them. By clause 3.2, Mr Burke 'acknowledge[d] that he has no further Claims regarding the Agreement and will not make any such Claims against Toll IPEC.'

50 Therefore, I find that Mr Burke entered into a Deed with Toll in which he settled and agreed not to further claim matters that were pleaded in the referral to the Tribunal. The issue of the representation to contract for a minimum of five years was a matter pleaded in the referral.

51 Where the matters settled by the Deed include the representation, Steve Burke Transport is estopped from asserting that in these proceedings.

52 However, the matter does not end there, for reasons I set out later, to do with the contract being renewed each year and, in this case, continuing for more than four years.

The yearly renewal?

53 The issue of the term of the contract needs to be determined. The terms of the contract are set out earlier in these reasons. The essential part for the purposes of this referral is that paragraph which says '[t]his contract shall expire on the final working day of June 2012 or by mutual agreement. If the parties mutually agree to renew this contract, the Metropolitan Contractor (in this case, Steve Burke) will have first option to renew the contract subject to a satisfactory review of the payments.'

The meaning of the contract

54 In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd and Ors* (2004) 219 CLR 165 at [40], Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ dealt with the approach to be taken to ascertaining the meaning of commercial contracts. Their Honours said:

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

55 In 2014, in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7, the Court reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract and:

> The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or object is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating. As Arden LJ observed in *Re Golden Key Ltd (in rec)*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience' (citations omitted).

56 Therefore, the meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood the parties to mean by the words of their contract, considering not only of the text, but also of the surrounding circumstances. The meaning of this contract is to be derived from the objective meaning of those words used in the contract in context. The first part is simple, that 'this contract shall expire on the final working day of June 2012 or by mutual agreement.'

57 There was no mutual agreement for it to expire prior to that date.

58 The final working day of June 2012 was approximately one year from the date upon which the contract was signed. Therefore, that contract expired approximately one year after it was commenced.

59 More significant is the second sentence, which reads 'if the parties mutually agree to renew this contract, the Metropolitan Contractor will have first option to renew the contract subject to a satisfactory review of the payments.' I am unsure, given the context, what meaning ought to be given to the Contractor having the *first option* to renew when the provision already says that it is to be in circumstances where the parties mutually agree to renew. In any event, I do not think that matters because the evidence is clear that the parties continued to apply the terms of the contract for a number of years.

60 The evidence is that there was no satisfactory review of the payments which resulted in the payments being increased. There appears to have been one review of the payments which resulted in there being no increase.

61 Steve Burke Transport says that the contract simply rolled over year-on-year, and therefore if Toll wished to terminate prior to the final working day of June on any year, it would need to pay him up to that final working day of June in the particular year.

62 One of the questions that arises is was this second sentence intended to be perpetually renewing the contract. There is no evidence that the parties formally renewed it each year. The evidence is that they continued working under the contract until 11 September 2015. Toll had earlier given what it considered to be reasonable notice of the termination of the contract expired. Toll says that the contract simply held over after the end of the first year.

63 The term 'holding over' appears not to have had judicial consideration in terms of commercial contracts such as this. However, in relation to leases, it is described in *Elrington v Judd* (1964) 64 SR (NSW) 150 at 153 as relating to the circumstances where a tenant remains in occupation of a property with the landlord's consent after the lease has expired.

64 In *Chitty on Contracts* (Vol 1, 28th ed) [1-034], the learned author wrote:

> There may also be an implied contract where the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to a newly expressed contract for another term.

65 The issue of whether the parties to a commercial contract agreed to a contract for another term was considered in detail by the Supreme Court of Victoria in *Brambles Ltd v Daryl Wail and Another* [2002] VSCA 150. Their Honours noted that it was not easy to find discussion in the books or case law, except in North America, on the question of whether the terms of a detailed written agreement for a fixed term continue to govern the parties to it where they continue dealing with each other after that term has expired. They cited the extract from *Chitty on Contracts* to which I have referred earlier. However, they went on to say (footnotes omitted):

> 57 …
>
> There is, as it happens, an early Victorian decision illustrative of that passage. In *Bullock v. Wimmera Fellmongery and Woolscouring Co. Ltd.* the appellant (as he may be called) had been appointed manager and accountant of a company at a certain annual salary with a house rent-free, the appointment being expressed to be for one year only, "then to be at the option of the shareholders" of the company. The engagement ran on without interruption for some 15 months, when the appellant was given notice of termination. In holding that there should be a new trial, Stawell, C.J. said that there was a "tacit consent", on both sides, to a continuance of the engagement and that, the defendants not having altered the terms of it, the plaintiff had just grounds for maintaining that the terms of his engagement continued as before. Barry, J. stated that an implied contract arose that the period of service was to be for another year, on the same conditions as those binding on the parties during the previous year.
>
> 58 Three other Australian cases where the question was considered have come to our attention. Two may be put aside immediately as containing no substantial discussion but turning on the interlocutory nature of the proceedings in question or fact findings. In the other case, *Cawsand Pty. Ltd. v. Normans Wines Pty. Ltd.* the expired written agreement was a short one which did not contain all the terms agreed upon. In those and other special circumstances of the case Brooking, J. declined to infer agreement as to a term for a particular period of notice of termination in the implied replacement agreement. Significantly for present purposes, however, his Honour distinguished the case "of a lengthy written agreement containing numerous terms governing the relationship between the parties, including one concerning notice, where the parties have so acted as to lead to the inference that notwithstanding the expiration of the term they regard the provisions of the agreement as still governing their relationship".
>
> 59 Because of the paucity of Australian cases on the subject it is helpful to consider at a little length North American cases, where the basis for the inference is elaborated further. The American position is summarised, in terms similar to those in *Chitty*, in *Corbin on Contracts* as follows:
>
> > "Parties who have made an express contract to be in effect for one year (or any other stated time) frequently proceed with performance after expiration of the year without making any new express agreement, of extension or otherwise. From such continued action a court may infer that the parties have agreed in fact to renew the one-year contract for another similar period. Illustrations can be found in leaseholds, employment transactions and contracts for a continuing supply of a commodity...".
>
> In one of the cases cited by Corbin, *Steed v. Busby* the Supreme Court of Arkansas, having stated that in determining whether a "tacit" but actual contract exists the prior course of dealing between the parties is to be considered, went on:

> "When an agreement expires by its own terms, if without more the parties continue to perform as before, an implication arises that they have mutually assented to a new contract containing the same provisions as the old, and the existence of a new contract is determined by an `objective' test, i.e., whether a reasonable man would think, from the actions, that they intended to make a new binding agreement. ... In such a case, when the parties continue to do business together, their conduct may permit, or even constrain, a finding that they impliedly agree that their rights and obligations should continue to be measured as provided in the old contract. *New York Telephone Co. v. Jamestown Telephone Corp.*"

In the *New York Telephone Co.* case, after the passage referred to in *Steed v. Busby*, Lehman, C.J., speaking for the Court of Appeals of New York, had stated:

> "Even in such a case, however, the reciprocal obligations arise from the new implied contract and, unless an intent to make such a new contract is expressed or may be fairly inferred from the conduct of the parties, the obligations of the parties are as matter of law not measured by the terms of the contract which has expired."

In another decision of the last-mentioned Court, which cited the passage from an earlier edition of Corbin corresponding to that set out above and is in turn cited in the current edition, *Cinefot International Corp. v. Hudson Photographic Industries* Desmond, C.J., speaking for the majority, stated that the rule that there was available an inference or implication of fact that the parties intended to renew was not really one of substantive law, but of evidence. His Honour said that entering into a contract to run for a year, and then continuing to act as if its time had not run, was sufficient evidentiary support for a finding that the parties in fact intended to keep it alive for another year. The contract in that case was classified as an agency agreement and the principle was stated not to be limited to leases and employment contracts. There are other United States cases to the like effect to those already cited, such as *Teachers Insurance and Annuity Association of America v. Ormesa Geothermal*; *Foster v. Springfield Clinic*; and *Consolidated Bearings Co. v. Ehret-Krohn Corporation*.

60 There are cases in Canada to the same effect, such as *Mitchell Energy Corporation v. Canterra Energy Ltd. and Kidd Creek Mines Ltd.* and *Imasco Retail Inc. v. Blanaru*. In the former the passage from an earlier edition of *Chitty on Contracts* corresponding to that set out above was applied to the facts.

61 Here the written agreement came to an end on 4 April 1993. The question whether an implied or tacit agreement to continue dealing on the same terms save that the agreement should be terminable on reasonable notice is to be inferred is, as Desmond, C.J. stated and as the other cases and the treatises make abundantly clear, an evidentiary or factual question. On the facts we have set out earlier we consider such an inference should be drawn here. The evidence, fairly sparse though it is, warrants the finding that after 3 April 1993 the parties proceeded as though still governed by the terms of the original agreement (save that, since it had already expired, either could terminate the substitute arrangement on reasonable notice), rather than a finding that they impliedly agreed merely that Andar should collect and deliver the laundry and that Brambles should pay it a reasonable sum for that or a finding that the parties made a series of individual implied agreements, six days a week, for that work to be done for a reasonable sum. In other words, after 3 April 1993 the parties operated under a standing agreement under which all the procedures and, importantly, the remuneration were exactly the same as they had been under the written agreement. The parties intended that that should be so. The contract thus made was not a mere variation of the original agreement, for it was not made until after the latter had expired. Accordingly clause 15.1, requiring signed written agreement for a variation, did not apply to it. Nor did clause 14.5, the "whole agreement" clause, since it was not apt to apply to a subsequent and separate agreement. Clauses 6.1 and 8.2, for instance, contemplate "renewal" and "extension". Renewal and extension are closely related concepts, normally involving a continuation of the contractual relationship on essentially the same terms and conditions as contained in the original contract. Whether a renewal creates a new contract, or extends the original contract, depends primarily on the intention of the parties as evidenced by the agreement or agreements they have made. Thus, generally an option to renew a contract is the right to require the execution of a new contract, whilst an option to extend the term, exercised during the currency of the term, merely operates by way of variation to extend the term of the original agreement. Whether the implied or tacit contract made after 3 April 1993, which cannot be an extension, is called a renewal is really a matter of definition. The important point is that it was a new and separate contract.

66 In this case, there is an express term of the contract that if the parties agree, it is to be renewed at its expiration, that this was not merely an extension of the contract.

67 Given that the initial contract was for the period from 30 June 2011 until the final working day of June 2012, this would indicate that unless the parties agreed to its expiration by mutual agreement at another time, it would be *renewed*, that is, for another year. At the end of each year thereafter, and subject to the parties agreeing, that clause is operative to renew the contract until the final working day of June of the next year. In those circumstances, there is no need to imply a term that it continues. The parties' conduct demonstrates that they agreed, in accordance with the contract, to work under the renewed contract. There was tacit agreement.

68 There is no provision for the termination of the contract by reasonable notice by one party or the other, only by expiration or by mutual agreement.

69 Therefore, I conclude that the contract would expire on the final working day of June of the year or that there would be mutual agreement for its termination. In the circumstances where there was no mutual agreement, where Toll sought to bring the contract to an end earlier than the expiration date contained in the renewed contract, then it is obliged to pay damages for the unexpired portion of the contract.

70 Both parties brought evidence of the commercial considerations, including the peaks and troughs in business. The evidence is clear that for a contract of this nature to have some commercial purpose or object, both the subcontractor and what is referred to in the contract as the Prime Contractor, need to have some certainty for a period of time. This is particularly so on the part of the subcontractor in the requirement to utilise capital in the form of a vehicle to perform the contract. That certainty can be provided by a fixed term or by reasonable notice. In Steve Burke Transport's case, a truck was purchased and for the purpose of purchasing the truck, a loan was taken out. I am not persuaded that the fact that it was taken out for five years is significant in terms of the contract because it is a contract that was yearly, not for five years, and that is the limit of what was agreed to by the parties, as reflected in the MAA.

71 I have taken account of the authorities and relied upon the actual terms of the contract to determine its meaning. The evidence given by Mr Burke, which was credible evidence, was of his contracts rolling over each year, and this appears to have been the norm with other contractors. This is confirmation of the term in the contract for renewal at the end of the existing term. I think it is appropriate to take account of those surrounding circumstances not so much for the purposes of the determination of the construction of the contract, but for confirming what a reasonable person would have understood to be the terms of the contract, particularly by reference to normal commercial considerations.

72 Therefore, I find that the ordinary meaning to be applied to the contractual term contained in the last paragraph of the contract is that it would be renewed for a year. In those circumstances, Toll is obliged to pay to Steve Burke Transport that amount which represents the unexpired portion of the contract, from 11 September 2015 to the last working day of June 2016.

Quantum

73 Toll quite correctly points out that there is some difficulty in discerning from the documents filed by Steve Burke Transport what the company's income and expenditure was for the unexpired period of the contract, and the income and expenses incurred in the work obtained after the Toll contracts. I think that the next step ought to be for the parties to confer with a view to identifying and agreeing those matters. The parties are to advise the Tribunal about the outcome of those discussions within 28 days.

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
Dash Nominees (AUST) Pty Ltd t/as Hawkins Haulage WA	Vendron Pty Ltd	Kenner SC	RFT 17/2016	N/A	Dispute re outstanding payments	Discontinued