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AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2021 WAIRC 00520

INTERPRETATION OF CLAUSE 28 AND ASSOCIATED CLAUSES OF THE LOCAL GOVERNMENT OFFICERS' (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHIRE OF BRIDGETOWN-GREENBUSHES
	APPLICANT
	-v-
	CAROLYN DAWS
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 1 OCTOBER 2021
FILE NO/S	APPL 17 OF 2021
CITATION NO.	2021 WAIRC 00520

Result	Discontinued by Leave
Representation	
Applicant	Mr M FitzGerald
Parties	Ms R Miller, Ms V Cullen and Mr M FitzGerald
Respondent	Ms C Daws

Order

WHEREAS this is an application made under section 46 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the application was served on the named parties to the Local Government Officers' (Western Australia) Award 2021 in accordance with regulation 52(2) of the *Industrial Relations Commission Regulations 2005* (WA);

AND WHEREAS on 28 September 2021, the Commission convened a Conciliation between the parties and the applicant sought leave to discontinue the application;

AND WHEREAS on 28 September 2021 the applicant lodged a formal application to discontinue the matter;

The Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979,* hereby orders –

1. The applicant is granted leave to discontinue the application; and
2. That this application be, and by this order is, discontinued.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2021 WAIRC 00481

APPEAL AGAINST THE DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00481
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
HEARD	:	FRIDAY, 13 AUGUST 2021
DELIVERED	:	FRIDAY, 27 AUGUST 2021
FILE NO.	:	APPL 7 OF 2021
BETWEEN	:	DAREN LEE Appellant AND WEST AUSTRALIAN POLICE FORCE Respondent

Catchwords	:	Industrial law (WA) - Removal of police officer - Loss of confidence by Commissioner of Police - Application to tender new evidence and amend grounds of appeal – Relevant principles applied
Legislation	:	*Police Act 1892* (WA) ss 33R(3), 33R(4) 33R(11) *Police Force Regulations 1979* (WA) *Criminal Code* *Weapons Act 1999* (WA)
Result	:	Order issued
Representation:		
Counsel:		
Appellant	:	Mr M Shipman of counsel
Respondent	:	Mr S Pack of counsel
Solicitors:		
Appellant	:	Western Australian Police Union of Workers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Carlyon v Commissioner of Police [2004] WAIRC 11966; (2004) 85 WAIG 708

Hogan v Hinch (2011) 243 CLR 506

Magyar v Director General, Department of Education [2020] WAIRC 00988; (2020) 101 WAIG 1

Reasons for Decision

Background

1 The appellant is a former member of the Western Australian Police Force who was at the rank of Senior Constable. At the time of the events leading to this appeal, the appellant was based at the Geraldton Police Station. Loss of confidence proceedings were commenced by the respondent against the appellant in October 2020, under the ***Police Act 1892*** (WA). The loss of confidence proceedings involved allegations arising from the arrest by the appellant and another officer, Constable Amphlett, of a person at her residence in Geraldton at approximately 5:30 AM on 13 November 2019.

2 The allegations against the appellant were set out in the respondent's Notice of Intention to Remove dated 19 October 2020 in the following terms:

> 1. On the morning of Wednesday 13 November 2019, in Spalding, you arrested and detained Deanne Gregory without lawful authority.
>
> 2. On the morning of Wednesday 13 November 2019, in Spalding, you used excessive force when you arrested and detained Deanne Gregory.

3. You were negligently or wilfully dishonest when you prepared a statement of material facts document and your witness statement for the prosecution of Deanne Gregory.

4. You failed to perform your duties in a proper manner when you included Constable Amphlett's witness statement in a prosecution brief for Deanne Gregory without addressing inaccurate and misleading information within that document.

5. You were wilfully _dishonest or misleading during your managerial interviews on 19 February and 19 March 2020.

3 The appellant denied the allegations and responded to the NOITR. The respondent was not persuaded to alter his view as to his loss of confidence in the appellant and as a result, the appellant was removed from the Police Force on 29 December 2020.

4 The appellant now appeals against his removal. The appellant has made two interlocutory applications in connection with his appeal. The first seeks the tender of new evidence under s 33R of the ***Police Act***. The second application seeks an amendment to the appellant's grounds of appeal. As there is a degree of overlap between the application to tender new evidence, some of which is sought to be referred to in the proposed amended grounds of appeal, both applications were heard together.

5 For the purposes of considering both applications, the following is provided by way of brief background. As to allegation one, the appellant maintained that he was fatigued from working long hours on his prior shift. He contended that relations between police and the Aboriginal population in Geraldton were tense, as a result of the shooting of an Aboriginal woman by a Police Officer in September 2019. The appellant maintained that Ms Gregory was highly intoxicated, was wielding a knife and made racist remarks against him. The appellant maintained the arrest of Ms Gregory was lawful and the charges of disorderly behaviour under the ***Criminal Code*** and carrying a weapon under the ***Weapons Act 1999*** (WA) were both justified.

6 As to the allegation of the use of excessive force in arresting Ms Gregory and placing her into the POD of the police vehicle, the appellant contended that he used neither excessive nor unnecessary force for the purposes of the ***Police Force Regulations 1979*** (WA). The appellant said that his actions in putting Ms Gregory in the POD were necessary to prevent Ms Gregory causing harm to others and the manner of placing her in the POD was to prevent injury to the appellant or his partner, Constable Amphlett.

7 As to the third allegation, the appellant maintained that some inconsistencies in his statements used in the prosecution brief were as a result of the conflation of the attendance at Ms Gregory's residence when the arrest was made, with an earlier attendance at her residence that same morning. Also, his recollections were affected by fatigue and medication. Additionally, the appellant contended that his statements were reviewed by superior officers in the initial preparation of the prosecution brief and were approved. The appellant also denied the fourth allegation, and he maintained that Constable Amphlett's statements were not materially inconsistent with his own and the conflation referred to above, contributed to any errors in this respect.

8 Finally, the appellant denied that he was wilfully dishonest in his responses to questions as a part of the managerial interviews in February and March 2020. For present purposes, the appellant contended that in the interview on 19 March 2020, the investigating officers adopted a prosecutorial style, were biased and the interview was conducted unfairly.

Application to tender new evidence

9 The new evidence sought to be tendered by the appellant is in the following categories as follows:

(a) audio recordings of all managerial interviews;

(b) excessive force examples and historical penalties;

(c) injury reports when placing offenders into a POD;

(d) newspaper and media reports regarding the shooting of "JC";

(e) an email from Senior Constable Christine Frey concerning the number of injuries to police officers when placing offenders in police vehicles and the introduction of "fast straps" (leg restraints) to reduce the potential injury to police officers when placing offenders into PODs of police vehicles;

(f) the agenda and minutes of an Occupational Safety and Health Advisory Committee dealing with officer assaults; and

(g) Geraldton Police Station CAD/tasking records for December 2018, 2019, and 2020.

10 Copies of the materials sought to be tendered, and the audio recordings, were filed with the application.

Statutory provisions and relevant principles

11 By s 8 and Part IIB of the ***Police Act***, provision is made for the removal by the respondent of police officers in circumstances where the respondent has lost confidence in an officer, having regard to the officer's integrity, honesty, competence, performance or conduct. An officer so removed, may appeal to the Commission from the respondent's decision, on the grounds that the removal is harsh, oppressive or unfair. An appeal from removal may be brought by an officer under Division 3 of Part IIB. It is clear from these provisions that an appeal is limited in scope and it is not a de novo proceeding. Subject to s 33R, by s 33Q, the parties are to consider the respondent's reasons for removal and the materials relied upon and advance their respective cases based upon it.

12 The Commission is required by s 33Q(4) to have regard to the interests of the appellant and the "public interest". The latter is to include the need to maintain public confidence in the integrity, honesty, conduct and standard of performance of Police Force members, and the special nature of the relationship between the respondent and police officers.

13 New evidence on an appeal is dealt with in s 33R of the ***Police Act***. It relevantly provides as follows:

> **33R. New evidence on appeal**
>
> (1) New evidence shall not be tendered to the WAIRC during a hearing of an appeal instituted under this Part unless the Commission grants leave under subsection (2) or (3).
>
> (2) The WAIRC may grant the Commissioner of Police leave to tender new evidence if —
>
> (a) the appellant consents; or
>
> (b) it is satisfied that it is in the interests of justice to do so.
>
> (3) The WAIRC may grant the appellant leave to tender new evidence if —
>
> (a) the Commissioner of Police consents; or
>
> (b) the Commission is satisfied that —
>
> (i) the appellant is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information;
>
> (ii) the new evidence might materially have affected the Commissioner of Police's decision to take removal action; or
>
> (iii) it is in the interests of justice to do so.
>
> (4) In the exercise of its discretion under subsection (3) the Commission shall have regard to —
>
> (a) whether or not the appellant was aware of the substance of the new evidence; and
>
> (b) whether or not the substance of the new evidence was contained in a document to which the appellant had reasonable access,
>
> before his or her removal from office.
>
> …
>
> (11) In this section —
>
> ***new evidence*** means evidence other than evidence of —
>
> (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
>
> (b) the notice given under section 33L(1);
>
> (c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);
>
> (d) the notice given under section 33L(3)(b); and
>
> (e) a notification of the removal from office.

14 The terms of s 33R reflect the restrictive nature of an appeal to the Commission under Part IIB of the ***Police Act.*** The definition of "new evidence" in s 33R(11) also confirms the limitations on an appeal, such that it is only material not considered and taken into account by the respondent in making a removal decision, that may be so characterised. Further, the language of s 33R(1) itself, the use of the words such as "shall not be tendered …" "unless the Commission grants leave …" affirms this limited scope and constraint. The qualification for the grant of leave, without consent by the respondent, which is the case in these proceedings, on an appellant's application, is satisfaction of s 33R(3)(b). As this provision is expressed disjunctively, it is clear that the Commission may be so satisfied if any of sub pars (b)(i), (ii) or (iii) are made out. However, the Commission's discretion to do so is further qualified by s 33R(4), such that irrespective of which ground(s) may be met in s 33R(3)(b), the Commission must have regard to, in effect, the appellant's prior awareness of the substance of the new evidence. Thus, s 33R of the ***Police Act,*** dealing with the circumstances in which new evidence may be tendered in appeals of the present kind, is far more restrictive than the common law principles applicable to the adducing of new evidence in appeals, for example, to the Full Bench under s 49 of the ***Industrial Relations Act 1979*** (WA): ***Magyar v Director General, Department of Education*** [2020] WAIRC 00988; (2020) 101 WAIG 1. (See too ***Laurent v Commissioner of Police*** [2009] WAIRC 00839; (2009) 89 WAIG 2177; ***Moran v The Commissioner of Police*** [2014] WAIRC 01358; (2014) 95 WAIG 185).

Consideration - tender of new evidence

15 We turn now to consider each of the appellant's categories of new evidence sought to be tendered, in light of the foregoing discussion.

Audio recordings of managerial interviews

16 The appellant submitted that the audio recordings of the managerial interviews, in particular, with himself on 19 March 2020, demonstrate bias, leading questions, and badgering of the appellant by the investigators. This was said to amount to the display of a general "prosecutorial" style, especially by Detective Senior Sergeant Hunter and also Detective Senior Sergeant MacKenzie. The appellant contended that the conduct of his interview on 19 March 2020 was unfair. Despite this contention, the appellant submitted, however, that the audio record also demonstrates the appellant's "stoic and unwavering responses" to the various lines of questioning put to him, as referred to in ground 5.2 of the appellant's proposed amended grounds of appeal.

17 The appellant also submitted that the interview of another officer, Sergeant Connor, who oversaw the charges preferred against Ms Gregory by the appellant, was also inappropriate and was alleged to have been used to provide evidence against the appellant.

18 The full transcripts of all the managerial interviews were provided to the appellant in order for him to prepare his response to the NOITR. The appellant made extensive reference to the transcript of his interview on 19 March 2020 (see tab 30 Bundle of Materials) with Detective Senior Sergeants Hunter and MacKenzie, in his response (see pp 7-10 tab 42 Bundle of Materials). The appellant made the same allegations then, that he makes now, as to the interviewing style adopted by the investigators.

19 As the respondent pointed out in his response to the application to tender new evidence, there has been no suggestion by the appellant that the transcripts of the managerial interviews were incomplete or inaccurate, to require supplementation by the audio tapes. It is therefore difficult to see how the absence of the audio tapes being separately considered, would possibly lead the respondent to have proceeded on wrong or mistaken information, at the time he made his decision for the purposes of s 33R(3)(b)(i). Furthermore, leading questions, or any suggestion of improper conduct, may readily be seen from a transcript, without the need for audio tapes.

20 Additionally, and more fundamentally, the appellant, having been told in his interviews that they were recorded, and having been given a full and complete transcript of the interviews, must be taken to have been aware of the audio tapes and thus, the "substance" of the new evidence for the purposes of s 33R(4) of the ***Police Act***. This is a factor to be weighed against the exercise of the discretion in this case. In any event, and irrespective of the above, we have, for the purposes of informing ourselves and to enable us to properly consider the appellant's application, listened to the audio tapes, especially that of the managerial interview of the appellant on 19 March 2020. We do not consider that the style of interview by the investigators can be characterised as contended by the appellant. To the extent that propositions were put to the appellant in the course of the interview, that could be described as leading questions, such questions are quite proper in an investigation, in order for a person to be afforded procedural fairness and to provide an opportunity to respond to contentions that the respondent may rely on at a later time.

21 We are therefore not persuaded that the appellant has established that the audio records of interview should be tendered in evidence in the appeal.

Excessive force examples and historical penalties

22 The second category of new evidence sought to be tendered are examples of prior disciplinary charges brought against police officers by the respondent, for the use of excessive force. We understand the appellant's contention to be that the respondent should have had regard to this type of material as a comparator in assessing the use of force allegations against him. The first example is a four page document setting out particulars of disciplinary charges against a police officer in February 2018. The document contains a summary of facts and a statement of four charges, only one of which relates to the use of excessive force against a person. There is no indication of an outcome other than a handwritten notation on the front page of the document, making reference to "fined $2,200".

23 The second document comprises a "Managerial Notice" and a "Managerial Notice – Endorsement". The documents refer to an incident during an arrest of a person by a police officer in March 2020, where unnecessary and excessive force was used. The use of the Managerial Notice served as a form of counselling and the officer was required to undergo refresher training.

24 Other than what appears on the face of the documents, we know nothing of the circumstances of the two incidents concerned, including whether any mitigating factors existed. The factual circumstances of these two cases would appear to be far removed from those the subject of these proceedings. As each case will turn on its own facts, it is difficult to see how the requirements of s 33R(3)(b) could be met. Furthermore, as noted by the respondent in his response, the appellant referred in his response to the NOITR (see pp 8-9 tab 42 Bundle of Materials) to "a recent example of allegations of excessive force being substantiated, yet the offending officer remained in force [sic]. It would seem I am suffering an inconsistent interpretation of any test of reasonable use of force".

25 It is not clear from this response whether the appellant was referring to either of the examples now sought to be tendered. However, the appellant seems to have been certainly aware of one or more of such cases, and accordingly s 33R(4) would not be met in any event.

Injury records when placing offenders into POD; Senior Constable Frey email; Occupational Safety and Health Committee documents

26 These categories of documents can be conveniently dealt with together.

27 Category (c) are injury reports over various dates in late 2020 and early 2021, where offenders have lashed out at Police Officers when being placed into the rear POD of police vehicles, following their arrest. Officers have suffered injuries in some of these incidents. The incident involving the appellant, as noted earlier, occurred in November 2019, about one year prior to the earliest of the reports, therefore well before the events. The respondent's NOITR was served on the appellant on 21 October 2020 (see tabs 40 and 41 Bundle of Materials) prior to the first of the incidents in the category (c) documents, which was dated 5 November 2020. Most of the incidents in the bundle sought to be tendered occurred in March and April 2021, after the appellant's removal.

28 Similarly, the category (f) document, being the Perth Branch Meeting of the Western Australian Police Union report from Senior Constable Frey, is dated 5 November 2020. Also, the Occupational Safety and Health Advisory Committee Meeting minutes were dated 12 November 2020, again well after the incident with the appellant, the subsequent NOITR and the appellant's removal. As noted by the respondent, it also seems that this category of documents was brought to the attention of the Union, prior to the provision of the appellant's response to the respondent's NOITR.

29 However, and despite the above, as with the documents in category (b), the circumstances of each of the incidents in the category (c) reports turn on their own facts. Comparisons with what occurred in November 2019, involving the appellant and Constable Amphlett, are very difficult to make. For such material to be of assistance to the Commission, as with the disciplinary incidents, direct and detailed oral evidence would be required, to enable a fulsome consideration of all of the facts and circumstances, so that an informed comparison could be made.

30 As with the examples of excessive force, the appellant also made mention in his response to the NOITR of "examples of officers being injured when placing persons in PODs" (see p 8 tab 42 Bundle of Materials). This suggests that the appellant was aware of the substance of this new evidence, either the actual examples sought to be tendered that predated the submission of his response on 11 November 2020 (see tab 42 Bundle of Materials), or records of other similar incidents. Thus, it is difficult to see how ss 33R(3) and (4) can be satisfied in these circumstances.

Media articles

31 The category (d) documents comprise a bundle of newspaper and other media reports in relation to the shooting by a police officer of an Aboriginal woman in Geraldton in September 2019. The appellant contended that the intense public pressure on the Police Force, as a result of this incident, unduly influenced the respondent to remove the appellant from the Police Force. The difficulty with this material is that most of it predates the incident involving the appellant and Constable Amphlett in 2019. Additionally, and self-evidently, from the various dates of the media reports, all of this material was in the public domain well after the incident. The appellant was also clearly aware of the situation as he made mention of it in his response to the respondent's NOITR (see p 1 tab 42 Bundle of Materials). It is therefore difficult to see how he could not have been aware of the substance of the new evidence for the purposes of s 33R(4).

32 Furthermore, there is nothing before the Commission to explain how, to the extent required, the mere existence of such material in the public domain would establish the likelihood that the respondent acted upon wrong or mistaken information or it might materially have affected the respondent's decision to take removal action, or how it is in the public interest that it be tendered, for the purposes of s 33R(3)(b).

CAD data

33 Category (g) is tables of information showing computer aided dispatch figures for priority 1 to 6 tasks for the Geraldton Sub-District for the months of November and December 2018, 2019, and 2020. The purpose of this material as advanced by the appellant, as we understand it, is to show that there was no loss of confidence in the Geraldton Police, following the incident involving the appellant in November 2019. The appellant contended that a measure of loss of confidence is a request for attendance by police from the public and the total number of jobs undertaken. The submission was that this data shows there was no appreciable decline. The appellant maintained therefore that the respondent should have had regard to this material in making his decision. As the concept of the "public interest" has been agitated by the appellant in his submissions on this point, in support of his new evidence application, some consideration of it now follows.

34 In determining an appeal of the present kind, the Commission is required to have regard to matters set out in s 33Q(4) which is in the following terms:

> **33Q. Proceedings on appeal**
>
> …
>
> (4) Without limiting the matters to which the WAIRC is otherwise required or permitted to have regard in determining the appeal, it shall have regard to —
>
> (a) the interests of the appellant; and
>
> (b) the public interest which is taken to include —
>
> (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
>
> (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

35 The concept of the "public interest", in general terms, imports the notion of the wellbeing and welfare of the public: *CCH Macquarie Dictionary of Law 1996* CCH Australia. As was said by French CJ in ***Hogan v Hinch*** (2011) 243 CLR 506 at [32], "… When used in a statute, the term derives its content from "the subject matter and the scope and purpose" of the enactment in which it appears" (citing ***O'Sullivan v Farrer*** (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ, in turn citing ***Water Conservation and Irrigation Commission (NSW) v Browning*** (1947) 74 CLR 492 at 505 per Dixon CJ; ***Osland v Secretary, Department of Justice [No 2]*** (2010) 241 CLR 320 at 329 [13] per French CJ, Gummow and Bell JJ).

36 Section 33Q(4)(b) extends the general notion of the public interest to specifically include, for the purposes of the ***Police Act*** and in particular Part IIB, the importance of the matters set out in sub-par (b)(i), in terms of the Police Force as a whole, and the special relationship between the respondent and members of the Police Force.

37 These broad concepts were considered and discussed by the Commission in ***Carlyon v Commissioner of Police*** [2004] WAIRC 11966; (2004) 85 WAIG 708. In referring to the respondent's broad power of removal of a Police Officer under s 8 of the ***Police Act*** (which is subject to the requirements of s 33L) the Commission observed at [111] to [118] as follows:

> 111 The Respondent sets out the legal principles that he considers should be addressed in dealing with appeals against removal action.
>
> 112 First, it is emphasised that there must be an appreciation of the very wide managerial power to remove police officers that resides with the Commissioner of Police under section 8 of the Act.
>
> 113 As statutory officers not all the principles that arise in the cases that deal with unfair dismissals necessarily apply to police officers under the ***Police Act 1892***.

114 Under the Act the Commissioner is entrusted with the responsibility to act to maintain public confidence in the Police Force and its members and to take prompt action to that end if he sees it necessary and desirable (***R v Miller***; ex parte Parker, unreported, WA Full Court, Lib No 980249 per Franklyn at 11). It is the responsibility of the Commissioner of Police to ensure that only officers who are trustworthy and adequately behaved should remain in the Police Force (***Bigg v NSW Police Service*** (1997) 72 IR 330 at 332).

115 Removal of an officer from the Police Force is not done as a punitive measure. In this case there is no charge of misconduct nor was it to be the basis upon which punishment was determined. Removal action results from the Commissioner of Police's lack of confidence in a member's suitability to continue in the Police Force, it is effected to protect the public, to maintain proper standards of conduct of members and to protect the reputation of the Police Force.

116 Removal from the Police Force under the Commissioner of Police's loss of confidence is not an avenue through which to exact retribution (***Minister for Police & Another v Smith*** (1993) 73 WAIG 2311 at 2327).

117 The Respondent points out that when considering appeals against removal action, it is not a question of whether the "punishment fits the crime" but rather has the action been justified to maintain the proper functioning of the Police Force?

118 The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of members of the Police Force, upon their assiduous performance of duty and upon judicious exercise of their powers (***Public Service Board and Another v Morris and Martin*** (1984-85) 156 CLR 397 at 412).

38 The Commission in ***Carlyon*** was urged to apply its approach in a 1998 matter under the former regime dealing with challenges against removals from the Police Force and continued at [119]:

119 On the basis of the above principles and subject to the statutory requirements set out in section 33Q of the Act in conducting an appeal it is, in the Respondent's view, appropriate for the WAIRC to adopt the approach which it set out in the Report to the Minister under section 80ZE of the ***Industrial Relations Act 1979*** on 18 December 1998:

> "We have approached the matter on the basis that the Commissioner of Police has a statutory duty to maintain an efficient and effective Police Force in which the public has confidence. It is trite to say that the "effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers". Moreover, we have approached the matter, recognising that it is the Commissioner of Police, and not us, who is charged with the responsibility of managing the Police Force. In common with industrial tribunals in other States, the Industrial Commission has been at pains to point out that in examining allegations of harsh, oppressive or unfair dismissal from employment the Commission is not to put itself in the position of taking over the management of the relevant workplace by substituting its opinion for that of the appropriate manager. Instead, its task is to determine whether there was a fair and reasonable explanation for the decision of the manager, which when viewed objectively, would be regarded by fair-minded persons as being totally legitimate. In the context of this review, the question is whether the recommendation of the Commissioner of Police was one which was open to a fair-minded person charged with the statutory responsibilities of the Commissioner of Police. In considering that question, it is necessary to have regard for the fact that … as with all members of the Police Force, occupies a statutory office, which is unlike that held by most other people who come before this Commission complaining of being unfairly dismissed from their employment. The duties and responsibilities of members of the Police Force are such that the public is entitled to expect that they always act in a way which is above suspicion and reproach….

39 In considering these issues, and endorsing this approach, the Commission in ***Carlyon*** concluded at [180] and [184]-[187] as follows:

180 We re-affirm acceptance of statements set out above going to the Commissioner of Police's statutory function in maintaining public confidence in the Police Force and his wide powers under section 8 of the Police Act 1892, to ensure that the public interest is served. What needs to be identified is the test to be applied to ascertain whether the decision of the Commissoner of Police to take removal action relating to a member of the Police Force was harsh, oppressive or unfair.

…

184 The interests of the Appellant and those aspects of public interest which go to the maintenance of public confidence in the Police Force have been identified by the parties in the cases considered here under section 33Q(1) of the Act, or in the reiteration by the WAIRC of legal principles which apply in an appeal.

185 What has not been articulated is the special nature of the relationship between the Commissioner of Police and members of the Police Force under section 33Q(4)(b)(ii) of the Act, which goes to the public interest and how these are to be regarded by the WAIRC in determining the appeal.

186 In our view this provision serves to remind the WAIRC to take into account that the nature of the relationship between the Commissioner of Police and members of the Police Force extends beyond those duties and obligations which are implied in normal employer/employee relationships. It goes beyond the member's duty of honesty, fidelity, obedience and to co-operate and the Commissioner of Police's duty to provide training and a safe work environment. It encompasses the commitment of a member to discharge the requirements of his/her commission whether on duty or off duty and to serve as a member of a disciplinary force. While the very nature of policing assumes that the environment in which members discharge their duties will not always be safe it is the duty of the Commissioner of Police to ensure that members receive appropriate education, training, information and supervision in order for them to make decisions appropriate to the proper discharge of their duties and in the public interest.

187 It is within the context of this relationship between the Commissioner of Police and the Appellant that the WAIRC must, in addition to the other matters cited in the statute, have regard in determining the appeal.

40 We adopt and apply this approach for present purposes. Thus, the Commission's obligation to take into account the public interest is not based on the individual conduct of the appellant and whether this has resulted in fewer calls to the Geraldton Police Station. Rather, it is the impact of the actions of the appellant and whether they are compatible with the need to maintain public confidence in the Police Force generally and as a whole, as discussed above, and whether it was open to the respondent, in light of the special relationship he maintains with Police Officers, to lose his confidence in the appellant in the circumstances of this case.

41 Therefore, we are not satisfied that the documents in this category satisfy the requirements of s 33R(3)(b).

Application to amend the grounds of appeal

42 To the extent that the proposed amendments to the grounds of appeal do not incorporate the subject matter of the application to tender new evidence, the application will be granted. Accordingly, save for par 6 of ground 2; pars 3, 4 and 5 of Allegation 2 and par 5 of the Relief Sought, the Schedule to the application filed by the appellant on 18 March 2021 will stand as the appellant's amended grounds of appeal.

43 We also note that the proper name of the respondent is the Commissioner of Police and not the West Australian Police Force. An order to amend the name of the respondent should also be made.

Conclusion

44 The application to tender new evidence is dismissed. The application to amend the grounds of appeal, is, to the above extent, granted. We would order accordingly.

2021 WAIRC 00486

APPEAL AGAINST THE DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAREN LEE
	APPELLANT
	-v-
	WEST AUSTRALIAN POLICE FORCE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 30 AUGUST 2021
FILE NO/S	APPL 7 OF 2021
CITATION NO.	2021 WAIRC 00486

Result	Order issued
Representation	
Applicant	Mr M Shipman of counsel
Respondent	Mr S Pack of counsel

Order

HAVING heard Mr M Shipman of counsel on behalf of the appellant and Mr S Pack of counsel of behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

(1) THAT the appellant's application to tender new evidence be and is hereby dismissed.

(2) THAT the terms of Schedule 1 to the notice of appeal filed by the appellant on 18 March 2021, save for par 6 of Ground 2; pars 3, 4 and 5 of Allegation 2 and par 5 of the Relief Sought, will stand as the amended grounds of appeal.

(3) THAT the name of the respondent be amended by deleting "West Australian Police Force" and inserting "Commissioner of Police"

(Sgd.) S J KENNER,
Chief Commissioner,
[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2021 WAIRC 00471

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00471
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 16 NOVEMBER 2020
DELIVERED	**:**	FRIDAY, 20 AUGUST 2021
FILE NO.	**:**	U 111 OF 2020
BETWEEN	**:**	CRYSTAL BROOKES
		Applicant
		AND
		KRAZY PRICE
		Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Unfair dismissal application - Whether Commission has jurisdiction - Respondent is a trading corporation - No jurisdiction to hear and determine application
Legislation	**:**	*Industrial Relations Act 1979* (WA); *Fair Work Act 2009* (Cth)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms S Christie (as agent)

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2) [2008] WASCA 254; (2008) 89 WAIG 243

Reasons for Decision

1 This matter has been awaiting decision since February 2021. The delay from that time until this has been the result of illness, mine, and ought not prejudice the applicant if she should choose to pursue a claim for unfair dismissal in the Fair Work Commission, it being clear, for reasons that follow, that she may not pursue it in this jurisdiction.

2 Given that Ms Brookes' claim is one relating to her alleged unfair dismissal, in order for the Western Australian Industrial Relations Commission to have jurisdiction to hear the claim, the Western Australian Industrial Relations Commission must be satisfied the *Fair Work Act 2009* (Cth) does not apply to her employment.

3 The *Fair Work Act 2009* (Cth), relevantly, in relation to unfair dismissal claims, applies to the exclusion of the *Industrial Relations Act 1979* (WA) in so far as the State Act would otherwise apply in relation to a "national system employer".

4 The *Fair Work Act 2009* (Cth) defines "national system employer" as a "constitutional corporation, so far as it employs, or usually employs, an individual".

5 "Constitutional corporation" is defined to mean "a corporation to which paragraph 51(xx) of the Constitution applies" and, relevantly, "constitutional corporations" are defined as "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

6 The respondent says it is a trading corporation. If a corporation is a trading corporation, the jurisdiction of the Western Australian Industrial Relations Commission to deal with Ms Brookes' claim is excluded by section 26(1) of the *Fair Work Act 2009* (Cth) and section 109 of the Constitution.

7 According to the decision of Steytler P in ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*** [2008] WASCA 254; (2008) 89 WAIG 243, in deciding whether an entity may properly be described as a trading corporation, the following principles should be considered:

(1) A corporation may be a trading corporation even though trading is not its predominant activity.

(2) However, trading must be a substantial and not merely a peripheral activity.

(3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services.

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant.

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description. Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as "trade".

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a "trading corporation" is a question of fact and degree.

(7) The current activities of a corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of a corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade.

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading.

8 In this matter, I have before me:

(a) an unfair dismissal application filed 23 September 2020;

(b) an employer response filed 8 October 2020 in which the respondent raised the jurisdictional objection with which these reasons deal;

(c) a transcript of proceedings before me on 16 November 2020 relating to the jurisdictional objection;

(d) a witness statement of Ishwar Pindoria dated 25 November 2020 with attachments "A" to "Q", provided under cover of email dated 26 November 2020; and

(e) the respondent's written submissions on the jurisdictional objection, provided under cover of email dated 26 November 2020.

9 The applicant was invited several times to provide documentation in response to (d) and (e) above if she wished to do so. Nothing was provided.

10 The materials provided by the respondent demonstrate conclusively that the applicant was employed by "Krazy Price Group Pty Ltd" and that that entity is a trading corporation.

11 Ishwar Pindoria is a director of Krazy Price Group Pty Ltd. (See [2] of witness statement)

12 Acting in that capacity, Mr Pindoria employed the applicant in a business run by Krazy Price Group Pty Ltd. (See [14] to [25] of witness statement)

13 Krazy Price Group Pty Ltd runs classic small retail businesses selling "homewares, party supplies, art and craft wares, pet supplies, toys, giftware and similar such items direct to the public". (See [11] of witness statement)

14 Krazy Price Group Pty Ltd is a quintessential trading corporation. It engages in trade to earn revenue. This is pretty much all it does.

15 There will be two orders.

16 The first will amend the name of the respondent in accordance with the submissions made at [6] to [11] of the respondent's written submissions.

17 The second will dismiss the unfair dismissal application against that entity for want of jurisdiction.

2021 WAIRC 00472

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRYSTAL BROOKES
	APPLICANT
	-v-
	KRAZY PRICE
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 20 AUGUST 2021
FILE NO/S	U 111 OF 2020
CITATION NO.	2021 WAIRC 00472

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms S Christie (as agent)

Order

HAVING heard from the applicant in person and Ms S Christie (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the name of the respondent be amended to 'Krazy Price Group Pty Ltd'.
2. THAT the unfair dismissal application be, and by this order is, dismissed for want of jurisdiction.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2021 WAIRC 00506

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2021 WAIRC 00506
CORAM	**:**	COMMISSIONER T B WALKINGTON
HEARD	**:**	WEDNESDAY, 14 APRIL 2021
DELIVERED	**:**	THURSDAY, 16 SEPTEMBER 2021
FILE NO.	**:**	U 68 OF 2020
BETWEEN	**:**	JAMEE CAREY Applicant AND SHIRE OF HALLS CREEK Respondent

CatchWords	**:**	Termination of employment - Settlement agreement reached - Application compromised - Whether application should be dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 23A, s 27(1)(a)
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr J Carey
Respondent	**:**	Mr A Sinanovic (of counsel)

Case(s) referred to in reasons:

Maurice Bradbury v Jos Van Baren, John Dewick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate (1995) 75 WAIG 2927

Prudential Assurance Co. Ltd. v McBains Cooper (a firm) [2000] 1 WLR 2000

MacLeod v Paulownia Trees Pty Ltd (1997) 78 WAIG 1057

Reasons for Decision

1 Mr Jamee Carey worked as a full time maintenance person for Shire of Halls Creek from 20 May 2019 maintaining shire municipal buildings, offices and residential houses, parks, gardens and other facilities.

2 The Shire terminated Mr Carey's employment on 28 February 2020 for his alleged inappropriate behaviour toward his supervisor.

3 Mr Carey denies the allegations and contends that his dismissal was unfair and seeks an order for compensation for loss incurred and injury sustained as a result of his dismissal.

4 Mr Carey's application for unfair dismissal was filed on 15 May 2020. The Shire contends that the delay of seven weeks beyond the period of 28 days prescribed by s 29(2) of the *Industrial Relations Act 1979* (WA) (**IR Act**) is substantial. The Shire contends that Mr Carey had not provided a reasonable explanation for the delay and objected to the Commission accepting Mr Carey's application out of time.

5 On 12 June 2020 the parties were notified of a directions hearing to program the tasks in preparation for the hearing and determination of the question of whether to accept the application out of time on 31 July 2020. The hearing was scheduled in accordance with the party's availability.

6 On 31 July 2020 Mr Carey's representative foreshadowed that an adjournment may be sought because it had not been able to contact Mr Carey in the previous 24 hours and therefore had not been able to take further instructions. At the direction hearing the applicant's representative had not been able to contact Mr Carey and was granted an adjournment.

7 On 4 August 2020 the parties were notified of the direction hearing on 21 August 2020, in accordance with their availability.

8 On 20 August 2020 the applicant's representative advised that it no longer acted for Mr Carey and suggested a further adjournment may be necessary in order to provide Mr Carey with sufficient time to prepare for the hearing.

9 On the morning of the direction hearing, an officer of the Commission directly contacted Mr Carey by telephone and confirmed that he had received the email with the link to join the hearing by video conference and that he did not wish to conduct a test.

10 Prior to the direction hearing, the Shire notified Mr Carey and the Commission that in the event that Mr Carey failed to attend, it would seek an order that the application be dismissed pursuant to section 27(1)(a)(iv) of the IR Act on the basis that the applicant had failed to pursue his claim with due diligence.

11 Mr Carey did not attend the directions hearing. A hearing was arranged for 1 October 2020 to hear and determine the Shire's application for an order to dismiss the matter.

12 The Commission refused the Shire's application on the basis that at the hearing Mr Carey submitted that he had made several changes in his life, and he was now in a position to be able to attend to the preparation and appearances required to progress his case.

13 Directions for the hearing and determination of the question of whether to accept Mr Carey's application out of time were issued on 12 November 2020 and a hearing was scheduled for 4 February 2021.

14 On 11 January 2021, the Shire requested the matter be listed for a directions hearing because Mr Carey had not complied with the direction to file and serve an outline of evidence for each witness he intended to call by 7 January 2021.

15 On 12 January 2021, Mr Carey sought an extension of time for the Shire's proposed direction hearing because he was grieving the loss of a close family member and a friend.

16 On 13 January 2021, the Shire informed the Commission that the parties had reached an agreement to settle the matter and it no longer sought a further direction hearing.

17 On 14 January 2021 Mr Carey contacted the Commission by telephone to advise that he had agreed to settle with the shire over email and had received the Settlement Agreement document but would not sign it. Mr Carey said he wished to proceed and requested an extension to the period to file his outline of witness evidence. Mr Carey emailed the Shire and stated that he had not agreed or signed the settlement offer and would be prepared to go to the next hearing.

18 The Shire advised Mr Carey that it considered the matter concluded because Mr Carey had agreed to the terms of settlement as evidenced in the email exchange between them.

19 On 14 January 2021, Mr Carey requested an extension to the time for him to file outlines of evidence of witnesses due on 7 January 2021 and an adjournment to the hearing scheduled for 4 February 2021 because he had not been able to focus on preparing for the hearing because he was grieving the loss of three family members in the recent three months.

20 The Shire opposed the extension for the filing of outlines of evidence of witnesses and the request for an adjournment on the basis that Mr Carey had previously indicated on 31 December 2020 by email to them that he was prepared for the hearing.

21 The Commission notified the parties that the procedural issues and matters raised by the Shire would be considered at a hearing listed for 4 February 2021.

22 On 2 February 2021, Mr Carey notified the Commission that he would be unable to attend the hearing on 4 February 2021 because the current COVID-19 measures prevented his return to Perth, and he did not have access to a computer to attend through video link from his remote location and requested the hearing be adjourned to an alternative date.

23 On 4 February 2021 the Shire requested Mr Carey's application be dismissed on the basis Mr Carey was barred or estopped from pursuing the proceedings because the parties had reached agreed settlement and the continuance of this matter in the current circumstances unfairly prejudices the Shire for several reasons, including having to incur costs which they should no longer have to incur.

24 The parties were advised that the applicant's request for an adjournment of the hearing was granted until 14 April 2021.

What Must I Decide?

25 I must decide whether this application should be dismissed under s 27(1)(a) of the IR Act because the parties had reached an agreement to settle Mr Carey's claim.

Principles

26 The Commission can dismiss a matter under s 27(1)(a) of the IR Act:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —

(i) that the matter or part thereof is trivial; or

(ii) that further proceedings are not necessary or desirable in the public interest; or

(iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or

(iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;

27 The Full Bench in ***Maurice Bradbury v Jos Van Baren, John Dewick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate*** (1995) 75 WAIG 2927, 2928 considered s 27(1)(a)(ii) in circumstances where parties had reached an agreement and observed that 'It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have. The Commission did not err in the exercise of its discretion or otherwise'.

28 Applying ***Bradbury*** in a claim for unfair dismissal, Beech C observed in ***MacLeod v Paulownia Trees Pty Ltd*** (1997) 78 WAIG 1057, that once an agreement to compromise is reached, the claim of unfair dismissal is no longer before the Commission but the agreement of the parties in settlement of it.

29 That is, an unimpeached compromise agreement represents the end of the dispute or disputes from which it arose (***Prudential Assurance Co. Ltd. v McBains Cooper*** [2000] 1 WLR 2000, [19]).

30 Consequently, if it can be said the parties concluded the terms of the agreement then a claim that a person has been unfairly dismissed is extinguished.

Did the Parties Reach an Agreement to Settle Mr Carey's Claim?

31 On 11 January 2021 Mr Carey emailed the Shire's representative indicating his acceptance of the Shire's offer of $3000 in settlement of his claim. The Shire's representative acknowledged Mr Carey's acceptance by return email and advised that a Settlement Agreement would be sent to him by the end of the week. Mr Carey emailed the details of his financial institution account and asked how long it would take until payment would be in this account. He was advised that payments are usually made within 14 days of the Settlement Agreement being signed by both parties and endeavours would be made to pay it sooner if possible.

32 I find that an agreement to settle the claim was reached by the parties on 11 January 2021. The compromise agreement reached by the parties is in writing contained in the email exchanges by parties. Mr Carey admitted in his email of 14 January 2021 and at the hearing that he had agreed to the settlement. Mr Carey says he did so before he found out that he could get an extension and that his acceptance of the offer was not official because he had not signed anything. However, Mr Carey is incorrect.

33 The email exchange and Mr Carey's admissions clearly evidence that he accepted an offer to settle his claim. This is sufficient. The Settlement Deed records the terms of the agreement made including payment, releases, confidentiality and non-disparagement. Clause 3 of the deed provides that the settlement sum was not payable until the execution of the deed by the parties. However, Mr Carey's refusal to sign the Deed does not mean that the agreement between the parties was not concluded by Mr Carey.

34 The agreement made on 11 January 2021 has overtaken Mr Carey's unfair dismissal application like ***Prudential Assurance Co. Ltd. v McBains Cooper***.

35 Consequently, adopting the principles in ***Bradbury***, I am satisfied that further proceedings are not necessary or desirable in the public interest pursuant to section 27(1)(a)(ii) of the IR Act.

36 For these reasons, I will order that application U 68 of 2020 be dismissed.

2021 WAIRC 00507

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMEE CAREY
	APPLICANT
	-v-
	SHIRE OF HALLS CREEK
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 16 SEPTEMBER 2021
FILE NO/S	U 68 OF 2020
CITATION NO.	2021 WAIRC 00507

Result	Application dismissed
Representation	
Applicant	Mr J Carey
Respondent	Mr A Sinanovic (of counsel)

Order

HAVING HEARD Mr J Carey on his own behalf and Mr A Sinanovic (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

RECEIVED APPLICATION—Matters pertaining to

2021 WAIRC 00184

RECEIVED APPLICATION - UNFAIR DISMISSAL

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADAM RICHARD BINKS
	APPLICANT
	-v-
	DDH1 DRILLING
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	MONDAY, 5 JULY 2021
FILE NO/S	REGC 28 OF 2021
CITATION NO.	2021 WAIRC 00184

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS on 24 May 2021, an application was received for filing by the Commission's Registry. At the time of filing, the prescribed $50 filing fee was not paid;

AND WHEREAS on 25 May 2021, the Commission's Registry contacted the applicant by telephone and discussed the filing requirements of the application. Following the conversation with the Commission's Registry, an email was sent to the applicant confirming what was discussed;

AND WHEREAS on 2 June 2021, a further email was sent to the applicant by the Commission's Registry informing him that he was required to pay the prescribed $50 filing fee if he wished to proceed with him application;

AND WHEREAS on 7 June 2021 the applicant responded to that follow up email with unclear intentions in relation to the application. On 8 June 2021, the Registry responded to the applicant advising that he must confirm clearly whether he wished to progress the matter and if so, to pay the prescribed $50 filing fee as soon as possible;

AND WHEREAS on 15 June 2021, the application was referred to the Chief Commissioner for directions. The Chief Commissioner directed a letter be sent to the applicant requesting he advise of his intentions regarding the application by no later than 5:00 PM on Friday, 25 June 2021, and that if no response is received, the application would be discontinued;

AND WHEREAS at 5:01 PM on Friday, 25 June 2021 the applicant telephoned the Chief Commissioner's Associate indicating he wished to pay the prescribed $50 filing fee;

AND WHEREAS the Chief Commissioner's Associate advised the applicant to telephone the Registry during business hours on Monday 28 June 2021;

AND WHEREAS no further contact has been received from the applicant and the prescribed $50 filing fee remains unpaid;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the application be and is hereby discontinued.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2021 WAIRC 00526

DISPUTE RE CONTRACT VARIATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2021 WAIRC 00526
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	TUESDAY, 8 JUNE 2021, WEDNESDAY, 9 JUNE 2021 & THURSDAY, 10 JUNE 2021
DELIVERED	:	WEDNESDAY, 6 OCTOBER 2021
FILE NO.	:	PSACR 17 OF 2018
BETWEEN	:	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
		Applicant
		AND
		NORTH METROPOLITAN HEALTH SERVICE
		Respondent

CatchWords	:	Public Service Arbitrator – Section 44 dispute – Estoppel – Authority to approve a payment above the industrial agreement – Estoppel can operate beyond the life of a fixed term contract
Legislation	:	*Industrial Relations Act 1979* (WA): s 26, s 44 & s 80E
Result	:	Declaration made
Representation:		
Applicant	:	Ms J Auerbach (of counsel)
Respondent	:	Mr R Andretich (of counsel)

Cases referred to in reasons:

Deatons Proprietary Limited v Flew (1949) 79 CLR 370
Ferguson v TNT Australia Pty Ltd [2014] WAIRC 00020
Flinn v Flinn (1999) 3 VR 712
Giumelli v Giumelli (1999) 196 CLR 101
Grundt & Others v Great Boulder Proprietary Gold Mines Ltd (1937) 59 CLR 641
Legione v Hateley (1983) 152 CLR 406
Lysaght Bros. & Co. Ltd. v Falk (1905) 2 CLR 421
Silovi Pty Ltd v Barbaro (1988) 13 NSWLR 466
The St Cecilia's College School Board v Carmelina Grigson (2006) 86 WAIG 3146
Vella v Wah Lai Investment (Australia) Pty Ltd [2004] NSWSC 748
Waddell v Waddell (2012) 292 ALR 788
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Wilson v Arwon Finance Pty Ltd [2020] WASCA 137

Contents

Reasons for Decision

1 Dr Debbie Smith and Dr Kim Farrington are members of the Australian Medical Association (**AMA**). They are employed by the North Metropolitan Health Service (**Health Service**) and work at the Sexual Assault Resource Centre (**SARC**).

2 Dr Smith and Dr Farrington are covered by the *WA Health System - Medical Practitioners - AMA Industrial Agreement 2016* (**Industrial Agreement**).

3 Under the Industrial Agreement, the pay level for a Senior Medical Practitioner (**SMP**) starts at Level 16 and goes up to Level 18, while the pay level for a Consultant starts at Level 16 and goes up to Level 24. The parties agree that Dr Smith and Dr Farrington are SMPs and not Consultants.

4 In February 2007, SARC practitioners began to be paid according to a new pay scale, which was adjusted in 2008 and 2012 (**SARC Pay Scale**). The SARC Pay Scale set out how SARC doctors could progress according to caseload and academic milestones.

5 Dr Smith and Dr Farrington progressed up the SARC Pay Scale as they achieved the milestones until they were paid at the top level of the SARC Pay Scale, which is Level 21.

6 In April 2016, a senior executive of the Health Service approved contract variations for Dr Smith and Dr Farrington which meant that they were paid at Level 23.

7 In April 2017, following a Premier's Circular, the Health Service reviewed all existing attraction and retention incentives. In May 2018 the Health Service wrote to the SARC doctors who were being paid according to the SARC Pay Scale and said:

a) the Level 23 contract variation would be rescinded in June 2018; and

b) going forward, all new contracts offered to SARC practitioners would align with the pay scale set out in the Industrial Agreement.

8 The AMA says that the SARC Pay Scale amounts to a representation or promise made by the Health Service to the effect that SARC practitioners, like Dr Smith and Dr Farrington, who obtained particular academic qualifications will be entitled to the corresponding pay level set out in the SARC Pay Scale. It argues that the Health Service is estopped from unilaterally terminating the SARC Pay Scale.

9 The Health Service says that the SARC Pay Scale was not authorised by an officer of the Health Service who had direct or delegated authority to authorise it nor any subsequent amendments to it. The SARC practitioners are not within the definition of 'Consultant' in the Industrial Agreement and so are not entitled to the remuneration of a Consultant.

10 On 15 June 2018, the AMA filed a s 44 application. Five conciliation conferences were held before the matter was referred for hearing and determination on 19 March 2021.

11 The AMA seeks a declaration that the Health Service is bound by the SARC Pay Scale with respect to ongoing contracts offered to Dr Farrington and Dr Smith. The Health Service says that this matter should be dismissed.

Question to be answered by the Arbitrator

12 The parties ask the Arbitrator to answer the following question in hearing and determining this matter:

> Is the Health Service estopped from offering a further contract to Dr Smith and Dr Farrington at a lower pay level than that set out in the SARC Pay Scale?

Evidence

13 Dr Smith, Dr Farrington, Dr Phillips and Dr Kelly gave evidence for the AMA. They all work as SMPs at SARC. Dr Phillips was the Coordinator of SARC from around 2002 until around 2017 when the Coordinator role became known as the Head of Department. In around November 2017 Dr Kelly became the acting Head of Department for SARC.

14 Professor Galbally, Dr Coid and Mr Salvage gave evidence for the Health Service. Professor Galbally is employed by the Health Service as a Consultant Psychiatrist and Medical Co-Director. Dr Coid was previously employed by the Health Service as Director of Clinical Services and Mr Salvage was Chief Executive of the Health Service from mid-2015 until August 2018.

15 Dr Smith, Dr Farrington, Dr Phillips and Dr Kelly were particularly impressive witnesses. There was nothing material in their evidence that was disturbed in cross-examination.

16 Generally all the witnesses presented as credible. While there was some difference in views about whether studying a Masters in Clinical Forensic Medicine is ordinary continuing professional development (**CPD**), I do not consider that there was any meaningful conflict in the evidence about material facts.

Clinical forensic medicine

17 Clinical forensic medicine integrates elements of emergency medicine, general practice, obstetrics and gynaecology and psychology, but it differs from these areas because of how it is informed by forensic principles. As part of a Masters in Clinical Forensic Medicine, doctors are trained in forensic biology, forensic toxicology and medicolegal principles so that they are 'aware of DNA contamination, minimisation and the risk of potential miscarriages of justice.' At its heart, clinical forensic medicine is the 'provision of medical and forensic services to the living'.

18 Clinical forensic medicine is not yet recognised as a specialty by the Australian Medical Council, although doctors can study a Masters in Clinical Forensic Medicine and can apply for a Fellowship of the Faculty of Clinical Forensic Medicine of the Royal College of Pathologists of Australasia.

SARC

19 SARC provides essential State-wide services in relation to people aged 13 and over who allege a recent sexual assault. SARC doctors deal with the medical and forensic management of patients, which includes seeing patients, producing medicolegal reports, providing expert witness testimony in the District Court, delivering education and training about the medical and forensic management of a patient after a recent sexual assault and liaising with general practitioners, police and psychologists to support their patients.

20 SARC doctors offer telephone support to doctors and nurses working in rural and regional areas about an acute sexual assault from a medical and forensic point of view. SARC doctors are often on call, including during the day when they are on session at SARC.

21 Some of the SARC doctors have studied a Masters in Clinical Forensic Medicine and are Fellows with the Faculty of Clinical Forensic Medicine of the Royal College of Pathologists of Australasia. These doctors have additional responsibilities and lead post-mortem examinations, consult with police in relation to homicides where police think there may have been a sexual assault, peer-review medicolegal reports, deliver forensic nurse training and give evidence at the Supreme Court in homicide trials.

22 A former Chief Executive of the Health Service in his evidence described SARC as an impressive service that is highly specialised and absolutely necessary.

The SARC Pay Scale

Introduction of the SARC Pay Scale

23 Dr Phillips gave evidence about mass resignations from SARC in around 2003. Seven or eight SARC doctors resigned, leaving just three doctors to develop and renew the service. This involved recruiting new doctors.

24 Around this time, Dr Phillips was the only SARC doctor who had studied forensic medicine. Qualifications in forensic medicine were held in high regard in Australia and internationally. It was necessary for SARC doctors to develop expertise in forensic medicine. They were encouraged to study forensic medicine and needed a reward for doing so. Dr Phillips gave evidence:

> Well, I was aware that the standards were, um, becoming higher across the country and I, um, assumed that West Australia would want to also have high standards, um, and I felt that we needed to, as quickly as possible, make sure that, um, the doctors became, um - you - you know, developed an expertise in the area.
>
> And what was your - how did you go about that?---So, um, I encouraged the doctors who we recruited to also, um, undertake studies in forensic medicine.
>
> Okay. And did you - did you think that that would be easy to get them to do the study?---Um, not unless there was some, um, reward for it. I didn't think they would just do it - - -
>
> Okay?--- - - - out of the goodness of their heart.

25 Dr Phillips gave evidence that Dr Amanda Frazer, who was the head of Women and Children's Health Service (a combination of what is now King Edwards Memorial Hospital and the Perth Children's Hospital), was very supportive of SARC doctors moving towards forensic qualifications and a career pathway. Dr Phillips said that Dr Frazer particularly wanted SARC doctors to have a career pathway that combined academic qualifications and experience levels.

26 Dr Smith gave evidence that Dr Frazer was head of the hospital.

27 In December 2005 Dr Phillips sent the following email to the SARC doctors:

> Dear All,
>
> I have been having discussons [sic] with Paula Chatfield and Dr Jon Rampono about developing a 'career pathway' in forensic medicine. Paula and Jon met with Dr Amanda Fraser [sic] yesterday and I'm delighted to let you know that Amanda is very supportive of this concept for SARC/CPU. In 2006, I would like to draw up a document that looks at levels of promotion beyond level 17 (which is currently reached after two years of experience as a senior medical officer). Amanda has suggested that WCHS would support both academic qualifications and years of experience, court cases attended etc in consideration of 'specialty' status. I think it is an extremely important consideration both for SARC doctors and as a model across Australia. I'm delighted! And looking for help with your ideas and concerns!
>
> Best wishes to all of you for a peaceful and merry Xmas.
>
> Thanks for being such a great team of colleagues and friends.
>
> Cheers,
>
> Maureen

28 Dr Phillips' evidence is that in January 2007 she wrote the following letter to Dr Frazer, copying in Dr Jon Rampono (a psychiatrist who was Chair of the Clinical Care Unit), Ms Paula Chatfield (Director of the Clinical Care Unit that SARC was part of) and Ms Tania Towers (the then line manager of SARC) (**Letter**):

> Dear Dr Frazer,
>
> I understand that in late 2005, discussions were held with Ms Paula Chatfield, Director of Psychological Medicine Clinical Care Unit; Dr Jon Rampono, Chair of PMCCU and yourself about the possibility of recognition of the post graduate qualifications in forensic medicine and clinical experience of the Sexual Assault Resource Centre medical staff.

Paula indicated that you were supportive of the concept and had suggested the development of a credentialing system or criteria for progression, which could be used as a career pathway for the SARC doctors.

In summary, there is an increasing demand for expert witnesses to be appropriately qualified as well as experienced in their field of practice. I have encouraged the SARC doctors to enrol in the Graduate Certificate, Diploma and Masters in Forensic Medicine that is offered by the Victorian Institute of Forensic Medicine in conjunction with Monash University. The courses are both time consuming and expensive and other than interest and professionalism, there is little incentive to undertake the study. At the moment, SARC doctors with a Vocational GP background reach their maximum salary level at SARC after two years of employment and there is no further recognition of experience or academic qualifications.

In my own situation, I have had to relinquish my Vocational GP registration in order to undertake the coordinator position at SARC, as it is a requirement for vocationally registered GPs to undertake at least 50% of their employment in general practice. Without a career structure that offers incentives for forensic qualifications, it becomes difficult to attract and retain highly qualified medical staff, particularly for those like myself, who are no longer able to maintain GP vocational registration due to my employment commitments with the Health Department of WA.

Currently, SARC has two Emergency Medicine consultants on staff, both of whom I would be reluctant to lose if opportunities arose elsewhere. The range of medical staff presently at SARC includes two GPs, two Emergency Medicine physicians and two doctors with extensive O&G training. The diverse background of the medical staff adds a richness and depth to our levels of expertise. It is important for SARC to retain such doctors.

As an example of the situation in another state, the Australian College of Legal Medicine, although not fully recognised as a specialty college, supports credentialing of Forensic Medical Officers at the Clinical Forensic Medicine Unit based in Queensland. Negotiations are currently under way in that state to approve remuneration levels that are greater for those Forensic Medical Officers with appropriate qualifications.

In WA, it may be appropriate to make comparisons with medical staff at the Child Protection Unit. I do not have access to information about comparative remuneration levels for staff at the two services or the reasons behind the titles of the comparable medical positions.

I would be happy to discuss a proposal for criteria for progression of these positions subject to your approval. The outcome for SARC would be to attract and retain medical staff, provide a career path for them and to improve the quality of service provision for patients. My suggestions for career progression are attached.

Yours sincerely,

Dr Maureen Phillips

Coordinator of Medical and Forensic Services

Sexual Assault Resource Centre PO Box 842

Subiaco 6904

CC Dr Jon Rampono, Ms Paula Chatfield, Ms Tania Towers

29 The Letter attached this pay scale:

Suggested Criteria for Progression of SARC Medical Officer Salary Levels

January 2007

LEVEL 15	HEALTH SERVICE MEDICAL PRACTITIONER YR3 OR VR GP YR3
LEVEL 16	HEALTH SERVICE MEDICAL OFFICER YR4 OR VR GP YR4
LEVEL 17	HEALTH SERVICE MEDICAL PRACTITIONER YR 5 OR VR GP YR 5 AND ABOVE
LEVEL 18	>200 SARC PATIENTS or GRAD CERTIFICATE FORENSIC MEDICINE
LEVEL 19	>400 SARC PATIENTS or GRAD DIPLOMA FORENSIC MEDICINE or >200 SARC PATIENTS plus GRAD CERT FORENSIC MEDICINE
LEVEL 20	MASTERS IN FORENSIC MEDICINE

30 In response to the Letter, on 23 February 2007 Dr Phillips received an email from Dr Geoff Masters (copied to Dr Frazer, Donna Sebo, Frances Marriott and Paula Chatfield). The email included an email train from Dr Frazer that also attached the Letter:

-----Original Message-----

From: Masters, Geoff

Sent: Friday, 23 February 2007 14:42

To: Phillips, Maureen

Cc: Frazer, Amanda; Sebo, Donna; Marriott, Frances; Chatfield, Paula

Subject: FW: SARC

Hi Maureen

I am happy to support this proposal and ask that you take on the role of advising myself of when the SARC Dr becomes eligible for the increase in level. I will then confirm level increase with Donna Sebo with a copy to the personal file.

Kind regards,

Geoff

Dr Geoff Masters

Executive Director, Medical Services

PMH/KEMH

Phone: 08 9340 8245 Fax: 08 9340 8644

e): Geoff.Masters@health.wa.gov.au

----Original Message-----

From: Frazer, Amanda

Sent: Thursday, 22 February 2007 11:50 AM

To: Masters, Geoff

Cc: Rampono, Jonathan; Chatfield, Paula

Subject: FW: SARC

Dear Geoff

Thanks for discussing this. I am supportive of the request in the letter above and Jon and Paula are also in support. If you agree it is reasonable for recruitment and retention purposes please could you recommend this be implemented to Donna Sebo?

Many thanks

Amanda

PS – please let Paula know the outcome so that she may inform the staff.

-----Original Message-----

From: Grayson, Francine

Sent: Thursday, 22 February 2007 11:45 AM

To: Frazer, Amanda

Subject: SARC

Letter from Maureen re credentialling

31 Dr Phillips forwarded the email chain set out at [30] to all SARC doctors, writing:

Dear All,

This attachment will let you understand my last email!!

Great cause for celebration !! I'll bring the champagne!

Dr Maureen Phillips

Coordinator Medical and Forensic Services Sexual Assault Resource Centre PO Box 842 Subiaco 6904

Ph 08 9340 1820

Email: Maureen.Phillips@health.wa.gov.au

32 In cross-examination Dr Phillips said:

> My understanding was that we had these discussions with the appropriate people, they approved it and it was now going ahead and there was evidence that it was going ahead because we were all paid accordingly and we all seemed to be on the same side in this. You know, everyone agreed that having some higher levels of qualifications in terms of providing the service was going to be in the best interests of service provision for the state of Western Australia. So there wasn't ever a sense of there being, you know, a half done process.

33 Dr Phillips gave evidence that the SARC Pay Scale was never discussed as being time limited or a temporary measure.

34 In re-examination Dr Phillips said:

> Right at the outset it was put to you that the - pursuing the Masters has always had a purpose. What purpose did pursuing the Masters have in 2007?---It had many purposes. I don't think it had 'a' purpose.
>
> Okay?---At a personal level I like to do things very well. I had made a big career change leaving general practice. I'd done a couple of years in psychiatry that hasn't come up in here. I'd already worked as a senior medical practitioner in psychiatry. And I was now taking on a new challenge which was to recreate this service after it had fallen apart. And I knew that this was the best program available in the country, if not internationally regarded. It never occurred to me that anyone would not think that we should be doing the Masters in Forensic Medicine. It was the benchmark best practice

standard and so it would provide stability and a pathway for people in their careers in medicine and most doctors that I know want to do the job well and want to do it to the best possible standards and - - -

And would the - - - ?--- - - - as part of that they expect to be paid for that effort that they put into it.

Okay, so as part of that they would expect to be paid and how would that occur?---How would that occur? How would the payment occur? Well, presumably - - -

Yes?--- - - - with negotiating your employer and your representatives.

And did you do that?---Well, to the best of my knowledge I did.

With the SARC pay scale?---With the SARC pay scale. The North Metropolitan Health Service wasn't a separate entity in those days. And - - -

Okay?--- - - - as far as I was aware the Women's and Children's Hospital was the entity that I worked for and they are the people that I negotiated with as my employer.

35 In cross-examination Dr Kelly said 'we had a pay scale in place that had been approved by appropriate people.' When it was put to Dr Kelly that the email chain at [30] amounted to support for the SARC Pay Scale but not approval, Dr Kelly disagreed, saying she had understood '[t]hat it was formally approved.'

36 Dr Farrington gave evidence that in around 2005 she was told that the SARC Pay Scale was being discussed and it might become something that could provide a career pathway for SARC doctors. Later Dr Farrington was told that the head SARC doctor was in discussions with the Health Service about the SARC Pay Scale and the people in charge were very supportive. Dr Farrington's evidence was that the Letter and emails set out at [30] above '[let] us know that finally the career progression was now approved and would come into effect.' In cross-examination, Dr Farrington said about the email chain at [31]:

Yes, back in 2007 we were made aware that it had been passed and implemented, yes. Approved.

So you were - you received that and afterwards the - the scale was approved - was applied?---Yes, it was.

And that was the extent of - of your notification that the - the scale had been implemented was the - the email of 24 February and the supporting document and the fact that it occurred?---Yes. So that email plus when we reached certain milestones we'd put in our paperwork and then our pay went up.

37 Dr Smith gave evidence that in around April 2004 she became aware of discussions between Dr Phillips and the hospital executive about developing a career pathway for SARC doctors that would include postgraduate study. Dr Smith's evidence about the email at [31] is that it was 'when we heard that the hospital had approved the career progression pathway.' Her evidence was that the correspondence at [28] and [30], along with their attachments, led her to understand that the SARC Pay Scale was approved and put into place.

SARC Pay Scale amended

38 Dr Phillips gave evidence that the SARC Pay Scale initially referred to academic milestones of Graduate Certificate Forensic Medicine, Graduate Diploma Forensic Medicine and Masters in Forensic Medicine. Each of those qualifications had a certain number of units or points of study toward them. For example, three units or 24 points were required for the Graduate Certificate, six units or 48 points were required for the Graduate Diploma and nine units or 72 points were required for the Masters in Forensic Medicine.

39 Dr Phillips said the SARC Pay Scale was updated when levels were renumbered in the relevant industrial agreement at the time, such that Level 15 became Level 16 and so on until Level 20 became Level 21.

40 Dr Kelly also gave evidence that the SARC Pay Scale changed, as described by Dr Phillips, in accordance with the change in numbering in the industrial agreement. Dr Kelly said that the pay rate stayed the same, just the numbering of the level changed. Dr Kelly said that this happened in 2008. Dr Farrington also gave evidence to this effect.

41 The 2008 SARC Pay Scale provided:

Procedure

Criteria for Progression of SARC Medical Officer Salary Levels

Amended July 2008

LEVEL 16	HEALTH SERVICE MEDICAL PRACTITIONER YR3 OR VR GP YR3
LEVEL 17	HEALTH SERVICE MEDICAL OFFICER YR4 OR VR GP YR4
LEVEL 18	HEALTH SERVICE MEDICAL PRACTITIONER YR 5 OR VR GP YR 5 AND ABOVE
LEVEL 19	>200 SARC PATIENTS or GRAD CERTIFICATE FORENSIC MEDICINE
LEVEL 20	>400 SARC PATIENTS or GRAD DIPLOMA FORENSIC MEDICINE or >200 SARC PATIENTS plus GRAD CERT FORENSIC MEDICINE
LEVEL 21	MASTERS IN FORENSIC MEDICINE

42 Dr Kelly's evidence is that under the Industrial Agreement, SMP year one is Level 16, SMP year two is Level 17 and SMP year three is Level 18. Those levels are the same as Consultant year one, two and three. SMP levels finish at Level 18, while Consultant levels increase per year up to Level 24.

43 At some point the Graduate Certificate and Graduate Diploma were amalgamated into the Masters in Clinical Forensic Medicine. The SARC Pay Scale was amended (likely by Dr Phillips) to reflect the unit points required for each academic milestone. Dr Phillips gave evidence that she thought this happened in 2012, based on a document that the Health Service put to her in cross-examination which said:

> Suggested Criteria for Progression of SARC Medical Officer Salary Levels
>
> Amended March 2012

LEVEL 16	HEALTH SERVICE MEDICAL PRACTITIONER YR3 OR VR GP YR3
LEVEL 17	HEALTH SERVICE MEDICAL OFFICER YR4 or VR GP YR4
LEVEL 18	HEALTH SERVICE MEDICAL PRACTITIONER YR 5 OR VR GP YR 5 AND ABOVE
LEVEL 19	>200 SARC PATIENTS or 24 points toward Masters in Forensic Medicine or equivalent.
LEVEL 20	>400 SARC PATIENTS or 48 points toward Masters in Forensic Medicine or equivalent or > 200 SARC PATIENTS plus 24 points toward Masters in Forensic Medicine or equivalent.
LEVEL 21	MASTERS IN FORENSIC MEDICINE

How the SARC Pay Scale was applied

44 Dr Phillips gave evidence about how the SARC Pay Scale was applied to SARC doctors:

> Okay. Thank you. So who actually administered the pay scale?---Um, as in - well, I think the hospital, but which part of the hospital - I presume the medical administration part of the hospital.
>
> So what did you have to do in order to progress people through the – or to effect the - - -?---Yeah.
>
> - - - change to people's levels?---I just had to, um, let medical administration know when people had met one of those criteria that took them from one level to the next. So for instance, when they got their Masters in Forensic Medicine, I would send a copy of that through.
>
> Through to?---To - well, initially, I think, um, Geoff Masters said I just needed to send it to Donna Sebo, but I can't - I can't - - -
>
> Okay. Was there ever a problem with any of that - - -?---No.
>
> - - - terms of progressing. Okay?---No, not at all.
>
> So - - -?---Sorry. Just to confirm, I understand, in effect, you're saying you would tell somebody in medical administration that a SARC practitioner had met some criteria in order to advance - - -
>
> Yes?--- - - - up an increment.
>
> That's right.?---And then it would just happen.

45 Dr Kelly gave evidence about how SARC doctors moved up the SARC Pay Scale. She explained that as academic milestones were achieved, the doctors would send proof of achieving those milestones to medical administration and the SARC manager. 'From there it would be approved by [Women and Newborn Health Service] hierarchy and applied by [Health Support Services] or [Health Corporate Network] or whatever pays us.'

46 Dr Phillips gave evidence that the SARC Pay Scale was applied for over 11 years, starting in 2007, by a large number of executive staff at the hospital, including Dr Frazer, Dr Masters, Dr Boardley (A/Executive Director, Women & Newborn Health Service) and Dr Salmon (Executive Director Medical Services).

47 Dr Kelly gave evidence that the SARC Pay Scale was 'given to us, it was applied - it was approved by the Executive Director of [Women and Newborn Health Service], it's been applied ever since'.

2016 contract variations

48 Much evidence was given at the hearing about contract variations in 2016 to Level 23. In light of an undertaking given by the Health Service at the end of the hearing that it would not pursue a claim for overpayment in relation to Level 23, and the AMA confirming that the remedy it seeks relates only to the SARC Pay Scale that goes up to Level 21, it is unnecessary to deal with the Level 23 contract variations in detail.

49 As part of its bundle of documents, the Health Service included an email chain from 2014 which dealt with recruitment for the position Senior Medical Practitioner 00008152.

50 The Health Service cross-examined Dr Phillips about this email chain. In relation to Dr Jana's email and his statement about putting 'SARC medical positions under the scanner, which I would like to avoid', Dr Phillips said:

> What I understood was that it was very complicated and that [Dr Jana] was a bit concerned that if we tried to change classification to this point and some embargo might be placed on something for a period of time that our chances of advertising and filling a position would be very problematic. And I think also because from my previous email the fact that level 19 and 21 are usually a consultant position that that would cause problems because our level on our career pathway was one where we couldn't call ourselves a consultant.
>
> Well, he says more than that, doesn't he:
>
> "I do not wish to take it up any further with HIRS and HCN at this stage as it would put all the SARC medical positions under the scanner."
>
> Under the scanner means under scrutiny, doesn't it?---Presumably.
>
> Presumably. I - - - ?---But you know, as far as I was concerned that was his job and his assessment that wasn't – you know, that was his understanding and his knowledge and his position, not mine as the coordinator at SARC.

51 Dr Smith, Dr Farrington, Dr Kelly and Dr Phillips explained that in March 2016, there was a new Executive Director, Dr Peter Wynn-Owen, who attended a meeting with the SARC doctors. At the meeting, the SARC doctors had a conversation with Dr Wynn-Owen about how several of the SARC doctors had become Founding Fellows within the Faculty of Clinical Forensic Medicine, within the Royal College of Pathologists of Australasia. The SARC doctors understood from that meeting that Dr Wynn-Owen was supportive of the work that the Founding Fellows did, and that they should 'be rewarded for that level of attainment or achievement…by way of a level change.' Dr Wynn-Owen said he would look into it.

52 As part of the bundle of documents tendered by the Health Service, at pages 22-24, there is a copy of a briefing note that referred to the issue of 'recognition of SARC Senior Medical Officers following Fellowship of Clinical Forensic Medicine through the Royal Australian College of Pathologists (RCPA).' It proposed that a Consultant be included in the SARC organisational chart and that the position be amended and pay level adjusted 'from AMA Level 21 to 23'. This briefing note was signed by Dr Felice Watt (Director Women's Health Clinical Care Unit), Dr Sayanta Jana (Executive Director Medical Services, WNHS) and Dr Peter Wynn-Owen (Executive Director, WNHS). It contains a section requesting sign off from the Chief Executive, which has been left blank. It was not in dispute that the briefing note was not put to the Chief Executive.

53 Exhibit MP11 is an email chain. The first email is dated 11 March 2016 from Ms Kylie Laughton to Dr Jana. In this email, Ms Laughton refers to an 'early draft BN' and a suggestion that they try to reclassify one of the SARC positions 'as a test case'. The next email in the chain, sent on the same day, is a reply from Dr Jana which says 'I suggest you discuss with Felice, as reclass is not required for the position and the matter has already been resolved with a simple solution. None of the paperwork you have has been progressed/escalated as it was not required.' The last email in the chain is from Dr Watt, who says:

> Doctors who are Fellows of the Faculty of Clinical Forensic Medicine can be paid at Level 23 through the career progression process (the briefing notes were not required for this)… When AHPRAH and AMC have recognised the specialist qualification they can then receive consultant/specialist title.

54 Dr Smith and Dr Farrington gave evidence that they were asked to send their fellowship certificates through to Dr Jana and their level was changed to Level 23. Neither doctor was told she was a Consultant. Both Dr Smith and Dr Farrington understood that the Level 23 variation was different to the SARC Pay Scale.

Representation

55 As set out above at [35]-[37], the effect of the evidence from both Dr Smith and Dr Farrington is that the emails from Dr Frazer and Dr Masters in response to Dr Phillips' career pathway proposal amounted to a representation by the Health Service that if they achieved the academic milestones and/or patient cases milestones set out in the SARC Pay Scale, they would be paid in accordance with the levels set out in the SARC Pay Scale.

56 Both Dr Smith and Dr Farrington refer to this as the career progression pathway.

57 Dr Kelly gave evidence that in early 2007 Dr Phillips presented the SARC Pay Scale at a SARC doctors' meeting, saying:

> We now have this career progression pathway. And it's called the SARC pay scale or SARC progression – you know, career progression and this is what it is. It recognises experience. But more importantly it recognises the Masters. And she'd talked about the Masters… And they really talked it up. And they said how much it helps your practice… And they showed me the – the pay scale. And if you do this you know like any other training program, like in obstetrics and gynaecology, you do your training program and you do your study and you do whatever and at the end you become recognised as a specialist or consultant and you get paid accordingly. And that's what this was there to do.

58 The effect of Dr Smith and Dr Farrington's evidence is that their understanding about the representation was reinforced by the Health Service's subsequent conduct. Each time the Health Service renewed Dr Smith and Dr Farrington's contract of employment, it would be on the basis of the pay level in the SARC Pay Scale they had achieved. Each time the doctors achieved an academic or patient cases milestone, they would arrange for proof of that to be sent to hospital administration. A contract variation form would then be completed, sometimes without Dr Smith and Dr Farrington's knowledge at the time, and the doctors would be paid according to the pay level in the SARC Pay Scale they had achieved.

59 Dr Smith and Dr Farrington's evidence is that in this way the SARC Pay Scale has been applied consistently by the Health Service for over 11 years, by senior administrators including Dr Geoff Masters (Executive Director, Medical Services), Dr Mark Salmon (Executive Director, Medical Services), Dr Sayanta Jana (Executive Director, Medical Services) and Dr Graeme Boardley (A/Executive Director, Women & Newborn Health Service).

60 Dr Smith denied that the SARC Pay Scale was ever expressed as being time limited or that it could be withdrawn at any stage, saying:

> No, no, not at all. To the contrary it was, ah, it was always in place, it was in writing. It was - I was aware that it was amended at some time by the - by the hospital. Um, and it was - it was continually, um, applied, ah, from the time that it came in from 2007 right up to 2018, um, when it was - when it was raised. Um, so it was amended, applied, supported by a whole range of different people that came and went through the executive. So, no, ah, it - it was sort of sold to us as a - or encouraged to us as a - a career long pathway.

Assumption and inducement

Dr Smith

61 Dr Smith gave evidence that she had taken a break in her training due to starting a family and her husband's work requiring a move overseas. In around 2004, when she was in her late 30s, those personal issues and other health issues had settled down. Dr Smith wanted to recommit to her career, doing further study and finding a career pathway in medicine. She considered General Practice and also did a session in surgical assisting with a gynaecologist. Dr Smith had an interest in sexual health and loved pathology. She considered retraining in anatomical pathology.

62 Not long after April 2004, Dr Smith became aware of discussions between Dr Phillips, who was the head doctor at SARC, and the hospital executive about developing a career pathway that would include postgraduate study. She said she 'pricked up her ears' because of her interest in forensic medicine.

63 Some five years earlier, Dr Smith had enrolled in the Clinical Forensic Medicine course. After a few weeks she withdrew because it was incredibly onerous and involved a significant time commitment and expense. She said that at that time (in 1999), 'it was not leading anywhere.'

64 Dr Smith referred to her 2006 performance review at which Dr Phillips encouraged her to consider studying forensic medicine. Dr Smith agreed to consider doing the course in 2007.

65 When giving evidence about the email set out at [27], Dr Smith said 'I guess it excited me… there was a potential real career pathway at SARC… a career not just a job, it would lead somewhere.' Dr Smith said: 'Yes. It did. It did. It - it made me more committed to, um - it encouraged me to sort of stay at SARC and - and to wait to see if this was going to be approved, um, so yeah, it - it really did.'

66 Dr Smith said:

> The career progression pathway, that was always about the Masters. And, um, so a couple of reasons I continued, one was, um, because I – I enjoyed the work, I thought it – I thought it was important work and I thought it did improve our practice and – and the – the sort of service that we offer medically and forensically to patients and to the criminal justice system. So I – I do believe in the – the Masters in terms of that knowledge and expertise that you gain from it. Um, secondly, very much so it was in our career progression pathway, that's why I began on the Masters and I was going to see it through. Um, and in my performance reviews even after I got the fellowship it was still encouraged as well, so it was sort of a – a joint, um, you know, decision or encouragement to continue with it.

Dr Farrington

67 Dr Farrington gave evidence that before she worked at SARC she worked as an emergency registrar at several hospitals, having developed an interest in emergency medicine. After SARC's sudden loss of doctors, Dr Farrington was asked to work as a locum at SARC. At that time, Dr Farrington was studying to specialise in emergency medicine. In 2003, Dr Farrington worked as a locum at SARC and also in emergency medicine. In 2005 Dr Farrington was offered a substantive position at SARC and stopped working as an emergency doctor. Around that time, Dr Farrington was aware of discussions about the possibility of the SARC Pay Scale, saying she was told that it might become something that could provide a career pathway. It affected her thinking and led to her starting the Graduate Certificate in Clinical Forensic Medicine in 2006. The effect of Dr Farrington's evidence was that she had to withdraw from the study because it was very hard and she had started a family, so she was not able to attend the mandatory days in Victoria.

68 Dr Farrington gave evidence that between 2011 and 2013 she started to question her commitment to SARC. She spoke about the challenging work and environment, including very limited full time equivalent hours (**FTE**) and a significant on-call requirement. She began to investigate other ways to develop and use her skills as a doctor, in particular her emergency skills, 'less so than [her] forensic skills, because they don't really translate anyway.' Ultimately, with encouragement from Dr Phillips, Dr Farrington decided to commit to finishing her Masters. In cross-examination Dr Farrington said most of the encouragement to obtain further qualifications came from the Head of Department and conversations amongst the team.

Reliance

69 Dr Smith gave evidence that she relied on the SARC Pay Scale. She said:

> Well, it provided - it - it provided a - a career, essentially, a - a career in an area that I was interested in. Um, it also encouraged me and rewarded and recognised postgraduate study and the attainment of those qualifications. Um, and it - and it really underpinned my decision to fully commit to SARC and fully commit to taking on the Masters and you know, I - I did then kind of - well, not kind of, I - I - I did then rely on that information that was provided to me to make decisions about my life and - and I decided to stay at SARC, to enrol in the Masters, which I started in 2007 and - and I - I continued, despite, ah, a whole range of, um, you know, personal difficulties. I kept coming back to the Masters because I knew - well, I - I enjoyed it. I found it interesting and I knew it was leading somewhere. I knew it was a career pathway. Um, and - and it was recognised by my employer.

70 Dr Smith gave evidence about her performance reviews. She said (and her performance review documents show) that in her March 2012 performance review, an agreed goal was that Dr Smith continue studies in forensic medicine, in January 2014 an agreed goal was that Dr Smith reconsider continuing the Masters in Clinical Forensic Medicine and in June 2015 she had completed eight units (which amounted to the Diploma in Clinical Forensic Medicine). Dr Smith planned to do four more units to finish the Masters and had also applied for Foundation Fellowship of the RCPA Faculty of Clinical Forensic Medicine.

71 In 2018 Dr Smith finished the Masters in Clinical Forensic Medicine.

72 Dr Farrington gave evidence about her performance reviews. She said (and her performance review documents show) that in November 2007 Dr Farrington agreed to undertake forensic training. In Dr Farrington's June 2010 and July 2015 performance reviews, the agreed future goal was that she would continue the Masters in Clinical Forensic Medicine.

73 Dr Coid gave evidence that doing a Masters is ordinary, ongoing professional development even when a role does not require a Masters, although he agreed in cross-examination that 'a Masters is not the usual thing you do for CPD requirements.'

74 Dr Phillips, Dr Smith and Dr Farrington denied that studying the Masters in Clinical Forensic Medicine amounted to ordinary professional development. Dr Smith said:

> I certainly wouldn't be doing something like the Masters, that – that's sort of, um, um, way beyond what one would do for normal professional development… The Masters was something that, you know, took me, ah, many, many years, um, and it was much more intensive in terms of, um, time that was required to complete it.'

75 In re-examination Dr Farrington said she would not have done the Masters as part of continuing professional development, saying, 'No and I think what I said is that my reasons for doing it were financial as the main earner in my family, that is what had me continue and deal with what it took to do it.' Dr Phillips said that the Masters was way above and beyond ordinary professional development. It was very onerous and a huge undertaking, far more so than conferences, research activities, peer review or contributing to research.

76 In cross-examination the Health Service's representative had the following exchange with Dr Smith:

> In every hospital there will be a - a document like that and someone will sit down with you and they'd say, "Well, doctor, where do you think your weaknesses are," and you would say, "Well, here, I mean, I could probably do a bit better in my reports or - - -?---Mm, mm.
>
> - - - "You know, I've got a weakness in this area, forensic medicine that" - - -?---Mm.
>
> - - - "Well, how do you want to fix that up?" and that might involve extra study as it did for you, no - it wasn't a case that Dr Phillips said to you, "Look, if you do this extra study then you can look forward to getting up to Level 20 in the SARC scale, wouldn't you have been inclined to do this simply as a practitioner developing his or her skills?---Definitely not.
>
> No?---No.
>
> You wouldn't have done it simply because what is said elsewhere that the Masters in Forensic Medicine became the gold standard in Western Australia if you wanted to go near a courtroom and you wanted your work to be accepted then you needed - - -?---Mm.
>
> - - - to have that?---Mm.
>
> Would that not have been something you would have wanted to do as a forensic and medical person so that your work was valued?---Not if there wasn't the, um, commensurate reward in terms of moving up levels and pay scales and having a - having a career progression. I - I would have actually done similar study of postgraduate length and - and difficulty and time in another area of medicine that led me to something - - -
>
> Right, so you would want to - you would have wanted to be a specialist elsewhere and you say you would have done the training and undertook what was necessary to get there if this avenue wasn't available in SARC?---Yes.

77 In cross-examination Dr Smith denied that 'the die was cast' in 2005, before the SARC Pay Scale came in, when she signed a five year contract, saying that if the career pathway had not come in, she could have changed direction then.

78 Dr Smith said that but for the SARC Pay Scale, she would not have taken the same path, saying: 'No, I would have done the same amount of work but in a different field. In a field that I knew that was valued and had a stable footing in terms of a pathway and recognition.'

79 Dr Farrington's evidence was that without the SARC Pay Scale, she would not have done the Diploma or Masters in Clinical Forensic Medicine, saying:

> The financial commitment, time commitment, and that was one of the things why I didn't continue in 2006, it was like, "What am I doing – what am I doing this for without that guarantee of the pay scale?" But once the pay scale was there, given, you know, what it took to do, that was why I understood my Masters so I could progress up that pay scale, both financially and for – as a progression in my career.
>
> …
>
> Without [the SARC Pay Scale], I wouldn't have done it. So not only in 2010 when I started, I don't think I would have continued with how hard it was, and I certainly don't think I would have, without the encouragement of the team or – I mean I really did enjoy the work at SARC and I think it's a really very interesting and – and – and challenging area to work in, but it's also a tough area to work in. So that pay scale and that progression, without it I don't think I would have stayed at SARC past 2012, I think I would have left.

80 Dr Farrington gave evidence about her motivation for studying forensic medicine: 'the reason I personally took it on was because as – as with a young family and the main wage earner, that was one of my main reasons I took it on, for the increase in remuneration.'

Detriment

81 Dr Smith and Dr Farrington gave evidence about the detriment they say they have suffered as a result of their reliance on the representation and assumption that that the SARC Pay Scale would continue to apply to them while they worked at SARC.

82 They gave evidence about the Masters course being onerous, time-consuming and expensive. The only place to study forensic medicine of this type in the southern hemisphere is at the Victorian Institute of Forensic Medicine. For Dr Smith and Dr Farrington, being based in Perth meant they had to travel interstate for each of the 12 units, paying for flights and accommodation as well as course costs.

83 Dr Smith estimated that she spent approximately $50,000 to study the Masters in Clinical Forensic Medicine. Beyond the financial cost there was also a steep personal cost. Dr Smith described the lost personal and family time. She started the course when her children were young, saying 'it's really been throughout their whole childhood, you know, hanging over us.' Her husband had to take time off work to support their children while she travelled to complete units. Dr Smith missed significant events as a result of the timing of compulsory units, including significant anniversaries and birthdays.

84 When asked if she regretted studying the Masters, Dr Smith said:

> I don't regret the knowledge that I gained. I – I do think it's a – really good course, um, so I – I do value that and I'm thankful for the knowledge. But I do – I -I – I almost feel kind of foolish that I kind of, you know, trusted in the, um, the system I suppose or the – the hospital executive that this was a career pathway, it was a good thing to do, it was encouraged, you know, um, and it was something that would be valued, recognised. It would lead to a better service that we provide the public and the criminal justice system. That I believe and I see it day to day and I do know that that's true. Um, but to now be cased at, you know, age 56 with suddenly it all being pulled away… it's hard.

She added: 'if this happens and it gets pulled away, I sort of partly regret not exploring other career alternatives at that time, which I was really ready to do. I was wanting to build a career and that's why I've done a lot of other extra work for SARC… I do partly regret it.'

85 Dr Smith gave evidence about lost opportunities and the financial impact of the SARC Pay Scale being withdrawn:

> What does it mean to be an SMP at Level 18- - -?---Yeah
>
> - - - As opposed to where you have been?--- Yeah. Well, it - what it means is - is, um, that kind of lack of recognition, lack of - of I guess reward for effort. I mean financially I'm in a position where, you know, I have had a lot of interruptions in my career for family reasons, health reasons, all of that. Um, not being in a position to sort of secure myself in terms of superannuation and things. So just in terms of those decisions that you make back then when something is - is said to you or - or encouraged, those decisions are now sort of all on really shaky ground. So it means - it means something financially. It also means something just in terms of that trust I suppose, um, trusting in that system. So, you know, do the work, try - try and - try and do it well, um, you know, sacrifice the time now, that's okay, but you - um, so that lack of trust is - is hard as well. Um, and I feel like I can't get that back, I can't get that - that time and I can't get back those opportunities to do something else to perhaps - to perhaps have gone into general practice and had - had my own practice or gone into sexual health or, um, even - even path. Um, so I've - I've lost those opportunities now because I did believe in what I was being told at the time and I committed to it. And - and it is good study, it's high quality and I do think we have developed a really good service because of it as well and I do believe in that and I think that's part of what I wanted to do, I think that's a really good thing.

86 Under cross-examination Dr Smith maintained that she would have been able to meet the required hours, specialist training requirement and the costs if she had chosen a different specialty.

87 When asked if she would have made the same decisions if she had understood at the time that the SARC Pay Scale was not much of a promise in the sense that it could be taken away at any stage, Dr Smith said: 'no, I wouldn't have. I would have looked for an alternative that – that, you know, gave me a future. Um, yeah, I would have.'

88 In re-examination Dr Smith confirmed that she would not have embarked on the career choices that she made if she had known that she 'would be maxing out at Level 18 for the rest of [her] career'.

89 The effect of Dr Farrington's evidence was that she would have pursued a different area of medicine if not for the SARC Pay Scale. She has considered her other options now, including going back into sexual health, becoming a GP or doing a Masters of Public Health. Dr Farrington considers it would not be easy and she would likely only finish the study requirements for those options in her mid-fifties, giving her 10 years of working life left.

90 Dr Farrington gave evidence about the cost of doing the Masters. She said it was very challenging in terms of time to study and travel, the requirement to go interstate, the assignments and the workload. She did it all with small babies and children. The course was inflexible, it was mandatory to travel to Victoria and there was no choice about when to go. Dr Farrington's evidence was that her husband says 'we did the Masters', because of the impact it had on their family. She spoke about time off work her husband had in 2011, and that when she had their third child, it was necessary for her husband to come with her to Melbourne so that she could do the course and breastfeed their infant, while her mother had to look after their other two young children.

91 Dr Smith and Dr Farrington also gave evidence about the other costs associated with their study. Holding the Fellowship of Forensic Medicine involves a significant CPD commitment. The CPD is greater (at 100 hours) and more targeted on forensic medicine, unlike the Australian Health Practitioner Regulation Agency (**AHPRA**)'s lesser and more general requirements of CPD. This involves travel and course costs. Each year there is a fee of around $1500. The doctors personally cover those costs, although they conceded that they get a professional development allowance under the Industrial Agreement.

92 Dr Smith and Dr Farrington gave evidence about the wider scope of duties and responsibilities because of their post graduate study and fellowships. Dr Smith gave evidence about a letter from Dr Coid dated 25 March 2021 which confirmed that scope of practice. Dr Smith and Dr Kelly said that letter formalised what had been an informal arrangement before. Dr Smith, Dr Farrington and Dr Kelly gave evidence that SARC doctors with the Masters and Fellowship in Forensic Medicine have a greater scope of practice, including:

a) post-mortem sexual assault examinations;

b) peer review of medicolegal reports;

c) training nurses in forensic medicine; and

d) providing expert opinions about non-SARC patients for the Director of Public Prosecutions.

93 The effect of the evidence from both Dr Smith and Dr Farrington was that they are unable to use their qualifications in forensic medicine other than by working at SARC. Dr Phillips gave evidence that at this stage there is 'no financial bonus' to doing private work in forensic medicine.

Approval, authorisation and above industrial agreement payments

94 In relation to determining how SARC doctors should be paid, Dr Coid gave evidence that 'it actually isn't very complicated' and 'my attitude to payment is if their names appear on the specialist medical register, you pay them as a specialist. If not… you run the risk of, um, doing something inappropriate.' He said the Industrial Agreement has a simple table setting out pay rates. Dr Coid gave evidence that he 'never found a mandate' to pay SARC doctors at Consultant rates. He was told that previous administrators at the Women and Newborn Health Service had agreed to various things but he never saw a memo or instruction about that.

95 For contract variations, Dr Coid said in cross-examination that 'the buck stops with the Director of Clinical Services' and agreed that the Executive Director approved Dr Smith increasing her hours at 'AMA Level 20' as a SMP in 2015.

96 Importantly, Dr Coid agreed that he was not sure if the SARC Pay Scale had been authorised appropriately. He also said that payments above the industrial agreement 'should not have been implemented without reference to the AMA and Department of Health as parties to the industrial agreement' and that he suspected Dr Frazer would not have been able to authorise payments outside the industrial agreement because 'the industrial agreement determines the payments and if alterations are to be made, or deviations, it should go back to the AMA and Department of Health.'

97 In re-examination Dr Coid said he would have expected some approval or document from the Department of Health in relation to the SARC Pay Scale. Had he been at the same level as Dr Masters and the SARC Pay Scale had been put to him, Dr Coid said he would hope that he would have 'kicked it upstairs to someone', saying 'I would specifically refer it to the Executive Director of the Women's and Newborn Health Service with a recommendation that she consulted with her – her department and area colleagues on the matter.' He agreed that that person would have been Dr Frazer at the time. He then agreed that 'the Department' was 'virtually synonymous' with the Director General.

98 Dr Coid said that he 'had heard' that occasionally people are 'paid according to a status not achieved' and gave radiologists at the Neurological Intervention & Imaging Service of WA as an example of that.

99 Dr Coid agreed that the SARC Pay Scale had been administered and applied by successive administrations.

100 Professor Galbally gave evidence that in her experience people are paid according to the industrial agreement. She does not know if people can be paid above the industrial agreement. She thinks not.

101 Mr Salvage gave evidence about authority to approve payments above the industrial agreement. He said that when he was Chief Executive (from mid-2015 to August 2018), that matter would have been 'submitted ordinarily through North Metro IR but on advice from the Executive Director of Medical Services' to the Chief Executive. He believed the Chief Executive would be the ultimate sign off on it. Mr Salvage went on to say:

> So, um, a context for belief rather than certainty, ah, is that there was a – a very significant period of transition in that period, ah, 2015/2016 as we were moving towards board governance and there was a review of delegation schedules across, ah, across health. Um, now, I haven't been able to familiarise myself with the delegation procedures in place at the time, ah, the original decision was made to notify or provide the benefit to the SARC medical practitioners.

He appeared to be speaking about the decision in 2016 to pay SARC doctors at Level 23.

102 Mr Salvage had difficultly answering a question put to him about who approved the two Level 21 contracts that were offered to Dr Kelly in 2017, saying:

> Yes, so it seems it's been offered at Level 21, so who would have approved that level?---Ah, that - that, um - look, I'm - I'm actually not able to answer that question directly with apologies. Um, there were matters handled within the hospital itself and King Edward being a tertiary hospital, ah, would have had the – the management of the industrial – the, um, contracts of engagement with senior medical practitioners. Um, ah, but the offering at [Level] 21 would be consistent with the advice from North Metropolitan IR that there was no valid, agreement in place to accelerate to Level 23.
>
> But that's at a higher rate than the industrial agreement?---Correct.

> For this practitioner 21, she wouldn't have been paid at 21 according to the industrial agreement as I understand it?---Correct.
>
> But she's been offered a contract at Level 21 and I'm just interested in knowing who authorised that?---Um, I'm afraid - - -
>
> Given all of this is about authorisation?---Sure. I'm afraid I - I can't answer you directly, it's likely to have been something that was formulated, um, at the hospital, um - - -
>
> And what does that mean? Who's at the hospital?---So in terms of management structure within, um, an area health service like North Metropolitan Health Service you'd have an executive office headed by a Chief Executive. Each of the main services - - -
>
> And that's you?---Correct.
>
> At the time?---At the time, thank you.
>
> Yes?---Um, each of the main services, so Sir Charles Gairdner, um, King Edward Memorial Hospital would have each had their own, um, Executive Director.

103 Mr Salvage agreed that offering Dr Kelly a contract at Level 21 involved offering a contract at a higher pay rate than the Industrial Agreement. Mr Salvage said he could not say that he authorised it. Mr Salvage's evidence was that such a renewal of contract (including at a higher pay rate than the Industrial Agreement) 'is a straightforward renewal of contract that wouldn't have come to myself as, as the Chief Executive.' Mr Salvage said he assumed Level 21 was available to Dr Kelly, notwithstanding that he agreed that the briefing note put to him expressly noted that as a SMP Dr Kelly was only entitled to be paid Level 16 – 18.

104 Mr Salvage's evidence was that in 2017 to offer above industrial agreement payments 'would have been by way of briefing to myself as Chief Executive.' Mr Salvage said that at the time the SARC doctors were moved to Level 23, in 2016, 'the Director General effectively was the ultimate authority for what went on in the public hospital system.'

105 Mr Salvage did not say who had authority to approve payments above the industrial agreement in 2007. He gave evidence that 'it may well be that [the Women and Newborn Health Service] had a specific delegation to deal with those matters at the hospital separate from the – from the Area Health Service.' Mr Salvage said that 'there was a period of time when there was a separate health service for Women's and Newborns and Children. It was the Women's and Newborn's Health Service, which had separate governance, separate arrangements. Um, I – I can't recall whether that was in 2007, it possibly was.' It was put to Mr Salvage that the Letter is addressed to Dr Frazer as 'Area Executive Director, Women's and Newborns Health Service, King Edward Memorial Hospital.' Mr Salvage said that in 2007 the Women and Newborn Health Service and King Edward Memorial Hospital 'were their own health service separate from the North Metropolitan Health Service.'

106 The Health Service's representative said he did not want to raise the delegation document with Mr Salvage.

107 When the Letter was put to Mr Salvage in cross-examination, Mr Salvage said 'it does appear that the people in relevant positions at that time accepted the argument.'

108 When it was put to Mr Salvage in cross-examination that it was 'not an uncommon thing for an employer to have made arrangements for above award payments', Mr Salvage said: 'Ah, well, I'd say particularly in North Metropolitan Health Service, um, and context for that being it was the service with the largest number of specialist practitioners… and it was – it was the way that, um, service risk was addressed… particularly in a time of medical workforce shortages.' Mr Salvage agreed that for a long time service risk was managed by paying practitioners above the industrial agreement, until the Premier's Circular came in in 2017 and 'fundamentally changed all of that.'

109 In cross-examination, Mr Salvage agreed that an arrangement like the SARC Pay Scale 'isn't all that unusual' and later he agreed that above award payments to address medical workforce shortages were 'a longstanding practice' between 2000 to 2010.

110 In re-examination Mr Salvage then agreed that 'in normal parlance, [the SARC Pay Scale] was not something that was authorised in accordance with the authorities that apply to it.' He also said that if an above industrial agreement payment was agreed to, it would have been pursuant to some sort of delegated authority.

AMA's submissions

111 The AMA says that the Health Service approved the SARC Pay Scale because of difficulties recruiting to SARC and to entice doctors to do further study so that SARC would be a leading and key service for the Health Service and all of Western Australia.

112 The essence of the AMA's submission is that the SARC Pay Scale was approved, administered and used by successive administrations at the Health Service from 2007 to 2018 without any concerns being raised with Dr Smith and Dr Farrington. The representation was clear and written. It was not an Attraction and Retention Incentive (**ARI**) so *Approved Procedure 7 – Attraction and Retention Incentives* (**AP 7**) did not apply to it. The SARC Pay Scale was not time limited. The representation enticed Dr Smith and Dr Farrington to choose forensic medicine as a specialty and to do further study toward the highest qualification in Clinical Forensic Medicine at the time, the Masters. Those doctors relied on the representation that the SARC Pay Scale provided a career pathway. They have suffered detriment in study time, costs, lost opportunity to choose another specialty, additional CPD requirements, College fees and wider credentialling leading to greater responsibilities. If the Health Service is not estopped from withdrawing the SARC Pay Scale in relation to those who relied on it, then the Health Service will continue to benefit from the deal struck in 2007 while the affected doctors will not. In the circumstances, it is unconscionable for the Health Service to switch the rules after Dr Smith and Dr Farrington acted on the representation, incurred detriment and cannot use their qualification anywhere else in Western Australia.

113 The AMA argues that the Health Service is estopped from employing Dr Smith and Dr Farrington at a pay level lower than that set out in the SARC Pay Scale, because 'the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations': ***Grundt & others v Great Boulder Proprietary Gold Mines Ltd*** (1937) 59 CLR 641 at 674 (**Grundt**).

Estoppel

114 The AMA says equitable estoppel operates on representations or promises about future conduct. Where certain conditions are fulfilled, this kind of estoppel is in itself an equity: ***Silovi Pty Ltd v Barbaro*** (1988) 13 NSWLR 466 at 472, looking backward from the moment the promise is due to be performed. It asks whether in the circumstances of what happened, it would be unconscientious for the promise not to be kept: ***Waddell v Waddell*** (2012) 292 ALR 788. Equity comes to the relief of one who has acted to their detriment by relying on an assumption where the other party to the transaction has played such a part in the adoption of the assumption that it would be unfair or unjust if that other party were left free to ignore it: ***Grundt*** at 675.

115 To invoke equitable estoppel, the AMA says there must be:

a) a clear and unambiguous representation;

b) an assumption or expectation on the part of the relying party;

c) inducement of the assumption by the promise;

d) reliance on the assumption by the relying party;

e) detriment suffered by the relying party if the assumption is not fulfilled; and

f) failure to avoid detriment on the part of the representor: ***Waltons Stores (Interstate) Ltd v Maher*** (1988) 164 CLR 387, 428-429 (**Waltons Stores**).

Representation

116 The AMA submits that the SARC Pay Scale and the reasons for it (as set out in the Letter above) expressly provides for progression to pay levels above the minimum pay levels in the industrial agreement once specific academic qualifications are obtained. In effect, the AMA argues that Dr Masters and Dr Frazer accepting the SARC Pay Scale and instructing Dr Phillips to advise the Executive Director, Medical Services when a practitioner became eligible for an increase, which was communicated to Dr Smith and Dr Farrington, amounted to the representation.

Assumption and inducement

117 By authorising and continuing to apply the SARC Pay Scale from 2007 until May 2018, the Health Service induced and maintained Dr Smith and Dr Farrington's assumption that if they attained the academic qualification and/or caseload milestone, they would be paid in accordance with the SARC Pay Scale if and when they were engaged by the Health Service. There was no indication this would be time limited. Indeed a time limit would not make sense in the context of the time and money involved in attaining the academic/caseload milestones under the SARC Pay Scale, particularly given those milestones would have extremely limited use outside of working at SARC.

118 Dr Smith's assumption was confirmed and reinforced by the Health Service when it incremented her to Level 20 after she received her Graduate Diploma in Clinical Forensic Medicine in 2015 and then offered her a five year contract as a SMP at Level 20 in August 2015.

119 Dr Farrington's assumption was confirmed and reinforced by the Health Service when it incremented her to Level 19 in November 2011 and to Level 20 in July 2012 and then offered her a five year contract as a SMP at Level 20 in August 2015.

120 The AMA says the representor must know or intend that the relying party will act or refrain from acting in reliance on the assumption or expectation. Knowledge is easily inferred in cases of assumption based on a promise or representation. In this case, the AMA says the Health Service was aware Dr Smith and Dr Farrington set out to achieve the academic milestones in the SARC Pay Scale, because this was the main reason for the SARC Pay Scale and the Health Service consistently applied the SARC Pay Scale until 2018. Further, the Health Service continued to encourage the doctors to pursue their academic qualifications.

Reliance

121 The AMA says Dr Smith and Dr Farrington relied on the representation when they chose SARC as their career path and primary place of employment over the other alternatives available to them, and when they chose to study forensic medicine. Their reliance was reasonable given they 'had received written communications with respect to the SARC Pay Scale.' The doctors chose SARC as their career path and studied forensic medicine because of the assumption that they would receive recognition and reward by being paid above the pay levels in the relevant industrial agreement. That assumption does not need to be the only reason they chose SARC as their career path and studied forensic medicine. It is enough that it was a reason: ***Flinn v Flinn*** (1999) 3 VR 712, 749.

122 In all the circumstances, the doctors adopting the assumption, choosing the career path at SARC and studying forensic medicine was reasonable.

Detriment

123 The AMA argues that there is a clear causal link between the assumption or expectation and the detriment suffered by Dr Smith and Dr Farrington, because they:

a) were enticed and forewent alternative career choices they could have made, and instead specialised in a field of practice that:

i. has limited opportunities in other jurisdictions or the private sector; and

ii. involves academic qualifications not transferrable to many other roles;

b) were enticed and agreed to obtain the academic qualifications at great personal and financial cost; and

c) are credentialled and used by the Health Service to take on greater responsibilities than other SARC practitioners who do not have the qualifications in forensic medicine (and who are paid more than Dr Smith and Dr Farrington).

Failure to avoid detriment on the part of the representor

124 The AMA says that the Health Service failed to act to avoid Dr Smith and Dr Farrington suffering detriment by not:

a) fulfilling the assumption or expectation the Health Service created by approving, implementing and continuing the SARC Pay Scale since 2007;

b) informing Dr Smith and Dr Farrington before they committed to SARC as a career choice and started to study forensic medicine that the SARC Pay Scale could be reviewed and unilaterally withdrawn by the Health Service;

c) seeking formal approval (if that was required) for the SARC Pay Scale in accordance with AP 7 in May 2010 when AP 7 was issued; and

d) providing a correct, complete and more compelling business case to Public Sector Labour Relations (**PSLR**) to 'formalise' the SARC Pay Scale. Instead the Health Service provided a business case to PSLR that the Health Service anticipated from the outset would not be approved and that stated the SARC practitioners do not have unique skills.

125 A representor may avoid being bound by estoppel by informing the relying party that the assumption is mistaken, but that must happen before irreversible detriment has occurred: Campbell J in ***Vella v Wah Lai Investment (Australia) Pty Ltd*** [2004] NSWSC 748 at [169]. The Health Service did not inform Dr Smith and Dr Farrington until 18 May 2018 that there was an issue with them being paid above the Industrial Agreement. By then Dr Smith and Dr Farrington had incurred the detriment.

Approval/authorisation

126 The AMA says that SARC practitioners were entitled to rely on the assumption that 'the process for the request had been initiated through the correct channels and that the approval of the SARC Pay Scale had been given with the requisite authority.' It argues that the SARC Pay Scale was formally endorsed and applied by the Health Service in each contract renewal process.

127 Critical to the AMA's case, it argues that there is nothing to prevent parties entering into a contract of employment that has above award or industrial agreement conditions. Indeed this commonly occurs with respect to the payment of wages: ***The St Cecilia's College School Board v Carmelina Grigson*** (2006) 86 WAIG 3146, 3156.

Is the SARC Pay Scale an ARI?

128 The AMA understands that the Health Service argues the SARC Pay Scale is an ARI and that as a result it is regulated by AP 7.

129 The AMA says the SARC Pay Scale is not an ARI. While it may have some elements of an ARI (in that it pays above the industrial instrument in relation to caseload milestones), the reference to academic milestones 'was akin to a contractual arrangement in its own right.' Further, as the SARC Pay Scale predated AP 7, it could not have been classed an ARI.

130 If the SARC Pay Scale is found to be an ARI to which AP 7 applied, then the Health Service failed to avoid further detriment to Dr Smith and Dr Farrington by continuing to encourage them to study forensic medicine but failing to seek formal approval for the SARC Pay Scale in accordance with AP 7. Moreover Dr Smith and Dr Farrington had already suffered detriment by May 2010 because they had foregone alternative career paths in favour of a career in clinical forensic medicine at SARC.

131 The AMA says deciding to pay practitioners above the minimum set out in the industrial agreement does not amount to a reclassification. It is 'nothing more than an agreement to pay above the minimum rates required to be paid for the classification of the practitioner under the AMA Agreement pending formal recognition of the specialty by AHPRA and the [Australian Medical Council].'

132 The AMA argues:

> The doctrine of ostensible authority is but a particular example of the operation of the doctrine of estoppel in pais, that is estoppel by representations which induce assumptions about a present or past state of affairs, including about a legal relationship between the parties. Agencies of government enjoy no general immunity from the operation of principles of estoppel, though they cannot be estopped by representation from taking action which they are required to take in order to fulfil their public duties. Nor can public bodies be estopped from resiling form [sic] representations which, if fulfilled, would involve *ultra vires* action on their part: Enid Campbell, 'Ostensible Authority in Public Law' (1999) FLR Vol 27, 6.

Relief

133 The AMA argues that relief should be based on the expectation that the promise or representation generated. Estoppel permits the Arbitrator to do what is required to avoid detriment to the party who has been induced to act on the assumed state of affairs. What is required to satisfy the equity will depend on the circumstances: ***Giumelli v Giumelli*** (1999) 196 CLR 101, 121.

134 If Dr Smith and Dr Farrington had not relied on the representation, they would have gone into other specialties and would likely now be at Level 24 under the Industrial Agreement. It is not possible to put a monetary value on the detriment in the circumstances, so the only fair way to make it good is to fulfil the promise that was made.

135 Dr Smith and Dr Farrington occupy more than one FTE of SARC's three FTE total. They are among the longest serving and most experienced of the SARC practitioners. It is not that the Health Service does not wish to continue to employ Dr Smith and Dr Farrington – the Health Service gave an undertaking that it would offer Dr Smith and Dr Farrington each a five year fixed term contract. Rather the Health Service proposes that Dr Smith and Dr Farrington continue to serve the Health Service's needs on terms and conditions that ignore the bargain struck in 2007 when the SARC Pay Scale was introduced, which has been consistently applied by the Health Service and its many representatives from 2007 until May 2018.

136 In the circumstances, the AMA says it is unconscionable for the Health Service to rely on the minimum remuneration scale set out in the Industrial Agreement and 'to hide behind the veil of lack of due authorisation and process.' The AMA says that it is ludicrous to argue that there was no authority to make the representation. That would allow anyone to make representations to entice people to pursue a course of conduct to their detriment and employer's benefit, and 'then pull the rug out' from under employees: 'It's quite a different issue for someone to be making fraudulent representations - that's a different issue, but in this case, what we're talking about, people made genuine representations.'

137 The AMA says the SARC Pay Scale was duly authorised. The Health Service knew about it and applied it. After this issue was formerly raised with the Chief Executive in 2017 in the briefing note dated 11 July 2017, it is apparent from the briefing note (which was annotated and signed by the Chief Executive on 26 July 2017) that the Chief Executive had no issue with contracts being issued to Dr Kelly at Level 21, being above the levels set out in the Industrial Agreement, even though he had not authorised those contracts.

138 As long as the elements of equitable estoppel have been met, the doctrine of estoppel operates such that where a contract of employment is offered to Dr Smith and Dr Farrington, the Health Service is estopped from relying on the minimum levels of remuneration set out in the Industrial Agreement. Instead, the Health Service must offer Dr Smith and Dr Farrington contracts with remuneration on the basis of the SARC Pay Scale. In that way the Health Service can avoid detriment to Dr Smith and Dr Farrington.

139 The Health Service continues to benefit from the doctors' qualifications. If the Health Service engages Dr Smith or Dr Farrington in future, it cannot resile from the SARC Pay Scale. There would not be flow on to SARC employees generally, only to those who relied on the representation and acted to their detriment.

140 The AMA asks the Arbitrator to declare that the Health Service is bound by the SARC Pay Scale with respect to contracts offered to Dr Smith and Dr Farrington. The AMA says the Arbitrator has the power under s 80E of the Industrial Relations Act 1979 (WA) (**IR Act**) to act according to equity, good conscience and the substantial merits of the case to issue orders to give effect to such a declaration.

Health Service's submissions

141 Much of the Health Service's written submissions focussed on the Level 23 issue which was later withdrawn by the AMA.

Estoppel

142 The Health Service's submissions about estoppel were brief. It argues that estoppel is an easy concept to state but is often difficult to apply, citing Dixon J at 674 in ***Grundt***: 'The law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.'

143 Estoppel seeks to avoid the harm that would ensue if the assumption were to be departed from. It is often said that the affected party must have acted to his or her detriment in reliance on the representation.

Approval/authorisation

144 The central thrust of the Health Service's case is that there is no evidence that the SARC Pay Scale was approved by any officer of the then Metropolitan Health Service with the authority to do so. At most, the SARC Pay Scale was 'recommended' by Dr Frazer, the 2007 Area Executive Director of Women and Newborn Health and Dr Masters, Executive Director Medical Services at Princess Margaret Hospital/King Edward Memorial Hospital. Neither Dr Frazer nor Dr Masters had authority under the applicable delegation schedule to approve the provision of Consultant remuneration outside the Industrial Agreement.

145 The Health Service says the AMA's case is really about work value. While it is not in dispute that the work done by Dr Smith and Dr Farrington is good, the issue in this matter is the application of the Industrial Agreement that regulates their conditions of employment and what was done to pay them above it.

146 The parties agree that Dr Smith and Dr Farrington:

a) have never met the definition of 'Consultant' under the industrial agreement; and

b) were only ever employed by the Health Service as SMPs.

147 The Health Service says that there were two ways that SARC doctors could be recognised as Consultants under the industrial agreements that applied to them:

a) by negotiated or arbitrated exception to the definition of Consultant; or

b) if the Director-General recognised their area of practice as being within the definition in the industrial agreement.

148 Neither of those things happened. The Health Service says:

> The corollary of that, you can't be paid as such, is what we say. It would be a nonsensical result if someone could turn around and say, 'Well, fine, we don't have to appoint you as a consultant medical practitioner, but we'll pay you as such, and you can progress', in a way which is at completely at variance with the industrial agreement that they have settled on behalf of their members. They have come before you and effectively are asking for an industrial agreement for two people, which is going to last the lifetime of their employment with this agency if you accept the argument.

149 The Health Service tendered into evidence several extracts from a delegation schedule it originally said applied between 2005 and 2013. At the end of the hearing, the Health Service handed up two documents it said were the full versions of the two delegation schedules that applied at the relevant times (being in 2007 and in 2016). They are:

a) 'North Metropolitan Area Health Service Authorities, Delegations and Directions Schedule', signed 31 May 2005 and amended in February 2006 (**2005 Delegation Schedule**); and

b) 'North Metropolitan Health Service Authorities, Delegations and Directions Schedule Version 4' dated 17 January 2013 and signed 20 December 2012 (**2013 Delegation Schedule**).

150 The Health Service says that the relevant delegation schedule shows that only the Area Chief Executive can change classification or appoint an employee as a Consultant. The parties agree neither of those things happened in this matter. Dr Smith and Dr Farrington were not reclassified, nor were they appointed as Consultants.

151 The Health Service argues that no one who considered the SARC Pay Scale had capacity to appoint to the Consultant role and:

> It would be an unusual result if there was no capacity to appoint into a position, the formal position, because it required qualifications, and fairly strict qualifications, and a process to be recognised, for there to be the capacity to pay as such.
>
> And so the inference that we would ask you to draw is that what was done was not done by anybody who had the authority to do it, in setting up the SARC scale. That would have required the input of the Area Chief Executive. That didn't happen. The only evidence that's been put forward as to approval are the emails in September of 2014, Dr Jana, the Executive Director. There was the person who drove that. And as I said, but that was in consultation with Dr Frazer, document 7 to 17 of - no, that's not what I was looking for. Document 6 is all that we've got by way of approval:
>
> "I'm supportive of the request in the letter above. Jon and Paula are also in, in support."
>
> That's from Dr Frazer to her subordinate, Dr Masters. She's supportive of the request. He's happy to support the proposal, but he has no authority to sign off on it, but he's going to implement it. So there was nobody in that equation that could have signed off on what was done. It's a matter of accepted evidence that after that, the SARC scale was implemented and the practitioners that are the subject of this application, and others, benefitted from it.
>
> Now, what we say about the scale is that it was an internal matter. It wasn't escalated outside of the confines of the SARC area, or that area. And it wasn't, for good reason. The emails that I referred to, between Dr Jana and others regarding the advertisement for the position 008152, are instructive in relation to that.

Is the SARC Pay Scale an ARI?

152 The Health Service made submissions about Premier's Circular 2017/04 (which directed a review of all existing ARIs) and AP 7, noting that 'the incentive payment constituted by the [SARC Pay Scale] significantly departs from Approved Procedure 7', which regulates the payment of above industrial agreement remuneration. According to the Health Service, AP 7 is important because it is:

> [A] clear expression that the Government does not consider Public Sector employers, and employing authorities, are free to offer remuneration outside that which has been determined by applying the relevant award or industrial agreement, nor that above award or agreement remuneration can be offered as an ongoing entitlement as an attraction and retention incentive.

153 Further, the Health Service argued that the Premier's Circular is:

> [N]othing more than an expression of what has always been the situation in the Public Sector. In theory, you are able to pay above the agreement, above award, in practice you can't. There's always some mechanism by which approval is required if you are going to depart from the classification, remuneration, and that's not a matter that is not known.

154 In relation to the decision to pay Dr Smith and Dr Farrington at Level 23, the Health Service said:

> If you want to depart from the classified remuneration, then you need approval. It's not just a case of saying, 'Well, we need to retain these people and therefore, we will do it.' It is a process and the sign-up needs to be at a high level of authority, formerly it would be Director-General and *it might have been* the Area Chief Executive, *possibly* the Director-General of Health in relation to the people concerned. (emphasis added)

155 The Health Service argues that the AMA settled the dispute about appropriate rates of pay for SARC practitioners and has agreed that they are not Consultants for that purpose in successive industrial agreements since 2004. No iteration of the Industrial Agreement provides for progression to Consultant levels for any employed medical practitioners. SMPs cannot progress under the Industrial Agreement to Consultant levels. Clause 26(4)(a) of the 2013 and 2016 industrial agreements provides that entry to levels is by appointment and subject to qualifications and 'years of experience gained in recognised specialist positions.' The facts of this matter are against Dr Smith and Dr Farrington being entitled to ongoing remuneration above their SMP classification.

156 The Health Service says the AMA has a heavy onus to discharge in contending that any future contracts should be paid above the level set out in the industrial agreements that the AMA negotiated and agreed to on behalf of the Health Service's doctors, including the SARC doctors. It says that in effect the AMA seeks an industrial agreement for two employees outside the Industrial Agreement and IR Act.

157 The Health Service relies on ***Ferguson v TNT Australia Pty Ltd*** [2014] WAIRC 00020 at [47] – [48] to argue that an employer is free to withdraw an increase in remuneration at any time where no consideration is provided for that increase. I understand that Health Service's submission to be that Dr Smith and Dr Farrington have been remunerated well above the SARC Pay Scale as a result of the Level 23 contract variations made in April 2016 and approved to be paid back to February 2016. Dr Smith and Dr Farrington have been paid at Level 23 for around five years, even though they were employed as SMPs and classified at Level 18 under the Industrial Agreement. At the time the Level 23 contract variations came in, the Level 18 rate was $195,997, Level 20 was $216,088, Level 23 was $250,148 and Level 24 Consultant was the highest level, only attained after 9 years of continuous service as a Consultant.

Representation

158 The Health Service disputes that the SARC Pay Scale could amount to a representation made to Dr Smith and Dr Farrington by the Health Service, because there is no evidence of any officer having the authority to make such a representation. The Health Service says: 'It is a trite proposition that a representation made without authority of the principal sought to be bound by it is of no effect.' It refers to ***Legione v Hateley*** (1983) 152 CLR 406 per Brennan J and ***Lysaght Bros. & Co. Ltd. v Falk*** (1905) 2 CLR 421 at 427-428 (**Lysaght**) and says 'a representation made without the authority of a principal cannot be relied upon to found an estoppel.' The Health Service conceded at the hearing that this case can be distinguished from ***Lysaght*** – there the agreement was to the agent's benefit and the principal's detriment, something the plaintiff was aware of. The Health Service was invited to provide other authority for this proposition but did not.

159 The Health Service argues that the language used in the representation that the AMA seeks to rely on 'uses equivocal support, is not necessarily approved' but the Health Service conceded that one could 'read that language as being a fait accompli'. Even so, the Health Service says it was not a decision and those involved lacked authority.

160 The Health Service argues that the AMA must prove the representations and establish the actual authority of the person who made the representations on behalf of the Health Service. If representations of the type made to Dr Smith and Dr Farrington could found an estoppel, they were still unauthorised and therefore of no effect.

Detriment

161 In relation to detriment, the Health Service says that obtaining a Masters in Clinical Forensic Medicine and a Fellowship of the Faculty of Clinical Forensic Medicine of the Royal College of Pathologists of Australasia are not as onerous as obtaining specialty registration in Emergency Medicine, which Dr Farrington indicated was an alternative career path. The Health Service suggests that it would not have been realistic for Dr Smith or Dr Farrington to have had another specialty outside of SARC, given their commitments outside work and where they were at in their stage of life.

162 Further, the Health Service argues that the only detriment that Dr Smith and Dr Farrington could have suffered is the additional study. The additional or higher level work they point to as a result of credentialling is within the scope of their duties. The Health Service conceded that the undisturbed evidence of Dr Smith and Dr Farrington was that their qualifications are not transferrable, and that even the Health Service's witnesses agreed that forensic medicine skills and qualifications 'are not as transferrable as you would like.'

Does the Masters amount to ordinary CPD?

163 The Health Service submitted:

> You've heard evidence from various doctors who are qualified and the nature of being a medico and the fact that these ongoing requirements regarding professional development, not necessarily obtaining admission to fellowships or obtaining masters, but as a practising doctor, these things are sometimes done simply to obtain more proficiency in the area which you practice.

Relief

164 The Health Service argues that it is industrially unfair for the two Consultants employed at SARC to be paid the same as Dr Smith and Dr Farrington, at Level 23, in circumstances where Dr Smith and Dr Farrington do not qualify for specialist registration and are not eligible for appointment to Consultant levels of classification under the Industrial Agreement, saying:

> The industrial unfairness of this is plain as a matter of reasonableness but also when one considers the levels of classification negotiated by the Applicant are based on the qualifications of Consultants compared to those of other medical practitioners and the nature of the work they are required to undertake.

165 The Health Service says that if the AMA is successful, this application would flow on to about five other doctors who are in a similar position. The Health Service also points to a doctor who was employed at SARC and did not obtain the additional academic qualifications. That doctor queried why some SARC doctors were paid in accordance with the SARC Pay Scale (and therefore more than he was), even though they were all SMPs.

166 The Health Service says that given the practice of offering 5 year fixed term contracts under the Industrial Agreement, it should not be required to pay Dr Smith and Dr Farrington in accordance with the SARC Pay Scale indefinitely. Dr Smith and Dr Farrington could have had no expectation of employment beyond their current contract and so could only reasonably rely on a representation for the balance remaining of that contract at the time the representation was made.

167 Further to industrial unfairness, the Health Service says that Dr Smith and Dr Farrington have been paid well above their classification level under the Industrial Agreement since at least 2016 for doing no more than their SMP jobs. In effect, they have been paid at least for the time that such a representation could reasonably be considered operative.

168 The Health Service neatly summarised its case:

> The equity, good conscience and substantial merits require the application to be dismissed. If there were representations that can found an estoppel, which is disputed, they were made without authority. It is an obvious proposition that the Respondent should not be bound by a contract negotiated without authority, nor a representation so made. Further Dr Smith and Dr Farrington received remuneration to which they were not entitled under the Agreement. It was provided without the required authorisation of the Respondent. Nor did they provide consideration for it. That remuneration was paid for a period well in excess of 5 years. It is true that Dr Smith and Dr Farrington undertook further education in their area of practice but this is the [sic] of all practitioners as part of their professional development.

169 The Health Service says the Arbitrator must look at the legal position of the parties, but the jurisdiction is broad and must be exercised having regard to the interests of both parties and not only the employees but also the employer. In this case the employer is a public sector body charged with management of public funds. It says: 'Normally that involves paying the minimum, unfortunately. That's the way it is.'

170 In relation to it being apparent from the briefing note received by Mr Salvage in 2017 that Dr Kelly was twice offered contracts at Level 21 (being a level above the Industrial Agreement), the Health Service said 'if it says that then [Mr Salvage] knew about it and he did nothing. It's something that needs to go into the pot, if I can put it that way, in deciding whether it's fair in the circumstances to allow Dr Farrington and Dr Smith to continue receiving remuneration'.

171 At the hearing, the Health Service submitted that the SARC Pay Scale was not set up by anyone who had the authority to do so. It said:

> Now, what we say about the scale is that it was an internal matter. It wasn't escalated outside of the confines of the SARC area, or that area. And it wasn't, for good reason. The emails that I referred to, between Dr Jana and others regarding the advertisement for the position 008152, are instructive in relation to that.

172 The Health Service argues that the emails at [49] show that Dr Jana and Dr Phillips were on notice that there was an issue of paying the medical practitioners at consultant levels outside of the agreement, and that Dr Jana did not want the 'whole issue' to be examined any further. When asked whether the Arbitrator could infer from his email that Dr Jana did not want to put SARC medical positions 'under the scanner' to avoid an embargo on advertising, the Health Service replied:

> We would say on a fair reading, he indicated there could be problems if… the issue was raised generally. The way in which the SARC people were being paid could be looked at more carefully, and there could be trouble. Now, what that might be or where it may have led to, I can't see.

173 In written submissions the Health Service argued that the emails from 2014 establish that Dr Jana was aware that the SARC Pay Scale had 'never been approved by an officer with the necessary authority.' The Health Service also argued that Dr Phillips' reply ('Now I understand') meant that Dr Phillips 'could only have "understood" that scrutiny of the payment of Consultant remuneration under the SARC scale to Senior Medical Practitioners was to be avoided.' The Health Service did not make this argument at the hearing and did not put this to Dr Phillips in cross-examination.

174 The Health Service argues that Dr Smith and Dr Farrington were paid well above the Industrial Agreement. They provided no extra consideration in the sense that they did no extra work. The credentialling arrangements were proposed by Dr Kelly and the relevant doctors were doing the higher level work anyway. That was to be expected, given they were the most experienced and long-serving doctors at SARC.

175 If the Arbitrator were to find an estoppel, it should not operate beyond the life of the next contract.

Consideration

176 Ultimately, I consider that the Health Service had a weak case that was valiantly argued by its representative.

Estoppel

177 The principles of promissory estoppel were recently set out by Quinlan CJ and Vaughan JA in ***Wilson v Arwon Finance Pty Ltd*** [2020] WASCA 137 at [82]-[102]:

> [82] The doctrine of equitable promissory estoppel operates to prevent a party (who we will refer to as the 'charged party') unconscientiously departing from an assumption or expectation which it has induced another party (who we will refer to as the 'claimant') to adopt and to act in reliance on to its detriment. This court has previously approved the following summary of the principle:
>
> > [F]or there to be an equitable estoppel there must be the creation or encouragement of an assumption that a contract will come into existence or a promise be performed, and reliance upon that promise in circumstances where departure from the assumption by the [charged party] would be unconscionable: ***Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]*** [2008] WASC 239; (2008) 39 WAR 1 [3543(e)].
>
> [83] Equitable estoppels (promissory and proprietary) are distinguished from common law estoppels by the circumstance that equitable estoppel is concerned with conscience - in particular with the prevention of unconscionable insistence on strict legal rights: P Brereton *Equitable Estoppel in Australia: The Court of Conscience in the Antipodes* page 5. See also at pages 7, 11 - 12. Thus it is said that the equitable doctrines result in new rights between the parties when it is unconscionable for a party to rely on his or her strict legal rights: ***Commonwealth v Verwayen*** (500). See also (436 - 437), (440 - 441). Nettle J has explained that the 'foundational principle on which equitable estoppel in all its forms is grounded is that equity will not permit an unjust or unconscionable departure from an assumption or expectation of fact or law, present or future, which that party has caused another party to adopt for the purpose of their legal relations': ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [213]. See also [211].

[84] Equitable estoppel has its basis in unconscionable or unconscientious conduct - and preventing the suffering of detriment occasioned thereby - rather than making good assumptions or expectations or bringing about the enforcement of promises: ***Waltons Stores (Interstate) Ltd v Maher*** (405); ***Commonwealth v Verwayen*** (411), (429), (501). It is grounded in the body of equitable doctrine that prevents unconscientious assertion of claimed legal rights: ***Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*** [2014] HCA 14; (2014) 253 CLR 560. The fundamental object of equitable estoppel is to protect a claimant against unjust detriment which would flow from the charged party's change of position if the charged party were permitted to depart from an assumption or expectation held by the claimant as induced by the charged party's representation or conduct (***Waltons Stores (Interstate) Ltd v Maher*** (404), (416), (418 - 419), (421), (423), (426 - 427), (453), (458); ***Commonwealth v Verwayen*** (409 - 411), (423), (453), (501); ***Sidhu v Van Dyke*** [1], [77], [82]; ***Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*** [84] - [86]; ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [39], [139] - [141], [217] - [218]. See also ***Grundt v Great Boulder Pty Gold Mines Ltd*** [1937] HCA 58; (1937) 59 CLR 641, 674 - 675 (Dixon J's passage there being the source for many of the later statements as to the purpose of an estoppel)). It is the action or inaction of the claimant as induced by the charged party which is the foundation for equitable intervention as '[i]t is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise': ***Sidhu v Van Dyke*** [58]. See also ***Giumelli v Giumelli*** [35]. So understood, detriment is relevant both in establishing the basis for the estoppel and in determining the appropriate relief. It also demonstrates that, while distinct concepts, there is a relationship between detriment and unconscionability.

[85] More is required than simply a representation or conduct on the part of the charged party that induces the claimant to hold an assumption or expectation. A mere broken promise will not suffice: ***Commonwealth v Verwayen*** (416). In ***Waltons Stores (Interstate) Ltd v Maher*** Mason CJ and Wilson J stated:

> [T]he doctrine of promissory estoppel … extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee [ie the claimant] changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required … this may be found … in the creation or encouragement by the party estopped [ie the charged party] in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. (406)

[86] In ***Waltons Stores (Interstate) Ltd v Maher*** four members of the High Court accepted that the elements of reliance and detriment may attract equitable intervention if it is unconscionable for a charged party to depart from an assumption or expectation he or she induced in the claimant (***Waltons Stores (Interstate) Ltd v Maher*** (401), (404 - 405), (407 - 408) (Mason CJ and Wilson J); (419) Brennan J; (453) Deane J. Gaudron J relied on common law estoppel rather than equitable estoppel). More recently, Keane J has explained that, as the charged party is responsible for creating the assumption or expectation on which the claimant acted, an estoppel arises to prevent the claimant suffering a detriment: ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [141]. So too Nettle J has emphasised the criticality of whether the charged party has played such a part in creating the assumption or expectation, in reliance on which the claimant has acted to his or her detriment, that it would be unconscionable for the charged party to depart from the assumption or expectation: ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [211], [217], [221].

[87] The determination of whether it is unconscionable for the charged party to depart from an assumption or expectation created in the mind of the claimant depends on the facts and circumstances of the case: ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [217]. See also ***Commonwealth v Verwayen*** (444 par 4).

[88] In Western Australia it has been fashionable to identify the requirements for the doctrine of promissory estoppel by reference to a re-formulated paraphrasing of the criteria enunciated by Brennan J in ***Waltons Stores (Interstate) Ltd v Maher*** (428 - 429). They are:

1. The plaintiff [ie the claimant] has assumed that a particular legal relationship then existed between the plaintiff and the defendant [ie the charged party] or has expected that a particular relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.
2. The defendant has induced the plaintiff to adopt that assumption or expectation.
3. The plaintiff has acted or abstained from acting in reliance on the assumption or expectation.
4. The defendant knew or intended him to do so.
5. The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.
6. The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise (***Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]*** [3539] (again part of the passage referred to with approval in ***Australian Goldfields NL (in liq) v North Australian Diamonds NL*** and ***Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd***.)

[89] Mr Wilson's defence was pleaded so as to pick up the six criteria set out in this passage.

[90] Brennan J elaborated on the second element. A charged party who has not actively induced a claimant to adopt an assumption or expectation will nevertheless be held to have done so in certain circumstances. This occurs where the assumption or expectation can be fulfilled only by transfer of the charged party's property, a diminution in his or her rights, or an increase in his or her obligations and the charged party, knowing that the claimant's reliance on the assumption or expectation may cause detriment to the claimant if it is not fulfilled, fails to deny to the claimant the

correctness of the assumption or expectation on which the claimant is conducting his or her affairs (***Waltons Stores (Interstate) Ltd v Maher*** (429)).

[91] The general application of Brennan J's six criteria retains wide judicial support (See eg ***Elvidge Pty Ltd v BGC Construction Pty Ltd*** [2006] WASCA 264 [40]; ***Caringbah Investments Pty Ltd v Caringbah Business and Sports Club Ltd (in liq)*** [2016] NSWCA 165 [72]; ***Risi Pty Ltd v Pin Oak Holdings Pty Ltd*** [2017] VSCA 317 [62] (fn 43)). It may, however, be accepted that where a case involves different circumstances to those considered in ***Waltons Stores (Interstate) Ltd v Maher*** Brennan J's general formulation of principles must necessarily be subject to qualification and refinement. In its application to particular circumstances the general formulation must be applied so as reflect and give effect to the broad equitable principles which underlie its application: ***Doueihi v Construction Technologies Australia Pty Ltd*** [2016] NSWCA 105; (2016) 92 NSWLR 247 [162] - [163].

[92] The six criteria enunciated by Brennan J do not expressly mention the term 'unconscionable conduct'. However, before stating his often cited passage from ***Waltons Stores (Interstate) Ltd v Maher*** Brennan J asked himself the question: '[w]hat, then, is unconscionable conduct?' (419) After noting, first, that an exhaustive definition was both impossible and unnecessary ((419-420), similarly, Deane J has stated that 'the notion of unconscionability is better described than defined': ***Commonwealth v Verwayen*** (440)), Brennan J went on to consider the question he had posed by reference to authority and principle, identifying - both by example and principle - conduct that would or would not be unconscionable (420-428). The six criteria, as amplified, summarise that discussion. As McLure JA has observed, unconscionability derives from the establishment of the six criteria; it is not a separate requirement: ***Elvidge Pty Ltd v BGC Construction Pty Ltd*** [41].

[93] Read together the six criteria describe, in a non-exhaustive way, conduct that is unconscionable for the purposes of equitable estoppel. In the circumstances of the other criteria, the conduct attributable to the charged party warranting equity's intervention is found in the second, fourth and sixth criteria (the sixth constituting the charged party's insistence on his or her strict legal rights). However, the importance of the second criterion ought not be overlooked. Since ***Thompson v Palmer*** [1933] HCA 61; (1933) 49 CLR 507 and ***Grundt v Great Boulder Pty Gold Mines Ltd*** it has been well understood that the justice of an estoppel depends not only on the fact that a state of affairs has been assumed as the basis for action or inaction and departure therefrom would occasion detriment. The justice of an estoppel depends also on the manner in which the assumption has been occasioned or induced: the charged party must have played such a part in the adoption of the assumption that it would be 'unfair or unjust' (ie unconscionable) if he or she were left free to ignore it (although the concepts of fairness and justice are not at large): ***Grundt v Great Boulder Pty Gold Mines Ltd*** (675). Whether a departure by the charged party from the assumption or expectation should be considered unconscientious (or unjust) depends on the part taken by the charged party in its adoption by the claimant: ***Thompson v Palmer*** (547). The charged party must have played such a part in the adoption of, or persistence in, the assumption or expectation that he or she would be guilty of 'unjust or oppressive' conduct if he or she were to depart from it: ***Commonwealth v Verwayen*** (444 par 4).

[94] The enduring significance of the part played by the charged party in inducing the assumption or expectation is evident in the observations of Keane J and Nettle J referred to at [86] above. It also explains Beech J's observation that equitable estoppel is not concerned with a self-induced mistake (even if both parties made the same mistake). Rather, the charged party must have contributed to or occasioned the claimant's assumption or expectation: ***Merilla Pty Ltd v Commonwealth of Australia*** [2015] WASCA 309 [202].

[95] While Brennan J's criteria for the establishment of an equitable estoppel are much quoted, the following passage from McHugh J's reasons in ***Commonwealth v Verwayen*** is also informative as to when conduct will be unconscionable for the purpose of the doctrine of promissory estoppel:

> It will be unconscionable for a party to insist on his or her strict legal rights if that party has induced the other party to assume that a different legal relationship exists or will exist between them, if he or she knew that the other party would act or refrain from acting on that assumption and if, as a result, the other party will suffer detriment unless the assumption is maintained. (500)

[96] Where an alleged equitable estoppel is grounded in a representation, the authorities have considered the degree of clarity that is required. In ***Legione v Hateley*** ([1983] HCA 11; (1983) 152 CLR 406, 435 – 437, 439, 440) Mason and Deane JJ said that a representation must be 'clear', 'unequivocal' or 'unambiguous' before it can found a promissory estoppel. It has, however, been suggested that it does not follow from the requirement that a representation be clear and unambiguous, that a representation which is insufficient to give rise to a contract will, on that account, necessarily disqualify (or prevent) the representation from founding an estoppel: ***Galaxidis v Galaxidis*** [2004] NSWCA 111 [93] (referring to ***Australian Crime Commission v Gray*** [2003] NSWCA 318 [193] - [207]); ***Sullivan v Sullivan*** [2006] NSWCA 312; (2006) 13 BPR 24,755 [84] - [85]; ***Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]*** [3473]; ***Australian Goldfields NL (in liq) v North Australian Diamonds NL*** [196] - [197]. Compare ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [143], [147] - [149]. This topic has significance in the context of ground 1. Accordingly, it is best to defer more detailed consideration of when a representation is sufficiently certain to support an estoppel to ground 1.

[97] It follows from the purpose of the doctrine of promissory estoppel, as discussed at [84] above, that it must be shown that the assumption or expectation created by the charged party's representation or conduct was in fact acted upon (***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [39], [43].) In the present case that reliance question - made explicit in Brennan J's third criterion - was the subject of ground 7. Further consideration of the authorities as to reliance is best addressed in the context of ground 7.

[98] Detriment is concerned with the consequences that would enure to the disadvantage of a claimant who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption or expectation on which the change of position occurred: ***Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*** [84]. The detriment must flow from reliance on the assumption tested at the time when the assumption is to be departed from: ***Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*** [87]. See also ***Commonwealth v Verwayen*** (417). Detriment is not a narrow or technical concept; it must be substantial, but it need not involve the expenditure of money or be quantifiable in monetary terms: ***Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*** [88].

[99] However, there can be no real detriment if the claimant asserting the estoppel would have been in the same position in any event: ***Sidhu v Van Dyke*** [92]. Also, detriment flowing from the charged party's failure to fulfil its promise (ie the claimant's assumption or expectation), but not from any act done or omission made by the claimant in reliance on the promise, is not relevant detriment: ***Commonwealth v Verwayen*** (429).

[100] When established, equitable estoppel gives rise to an equity (ie an entitlement or obligation of which a court of equity will take cognisance) (***Commonwealth v Verwayen*** (435)) in favour of the claimant claiming the benefit of the estoppel (***Waltons Stores (Interstate) Ltd v Maher*** (403 - 404), (416), (419 - 420), (423), (430 - 432), (448)). The remedy required to satisfy the equity varies according to the circumstances of the case (***Waltons Stores (Interstate) Ltd v Maher*** (419)). Depending on the circumstances of the case the equity may, or may not, call for the enforcement of the assumption or expectation on which it is founded: ***Commonwealth v Verwayen*** (412 - 413), (429 - 430), (441 - 443), (454), (487), (501); ***Sidhu v Van Dyke*** [82] - [86]. Relief is accorded only to the extent of the minimum content of the assumed state of affairs from which it would be unjust or unconscionable for the charged party to depart (***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [218]) - ie the minimum equity needed to avoid the relevant detriment (***Commonwealth v Verwayen*** (429). See also (475 - 476)).

[101] Thus consideration ought to be given to the extent to which it is unconscionable for the charged party to depart from the assumption or expectation that he or she has created (***Sidhu v Van Dyke*** [77]). To act conscionably a charged party need not necessarily make good the assumption or expectation induced by his or her representation or conduct. Good conscience does not, in all circumstances, preclude a departure from an assumed state of affairs - it may be, for example, that the detriment sustained by the claimant may be adequately compensated by other means (***Commonwealth v Verwayen*** (441); ***Sidhu v Van Dyke*** [83] - [84]; ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [218]). The court, as a court of conscience, goes no further than is necessary to prevent the unconscionable conduct: ***Waltons Stores (Interstate) Ltd v Maher*** (419); see also (425) (where it is said that the measure of the equity varies according to what is necessary to prevent detriment resulting from unconscionable conduct). See also: ***Commonwealth v Verwayen*** (501); ***Giumelli v Giumelli*** [50] - [51]; ***Sidhu v Van Dyke*** [85]. In that respect ***Waltons Stores (Interstate) Ltd v Maher*** has been interpreted as a case in which:

> a majority of [the High Court] concluded that equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct and to do justice between the parties. (***Commonwealth v Verwayen*** (411))

[102] Plainly, however, there are cases where good conscience requires that a charged party be held to the assumption or expectation induced by his or her representation or conduct (See eg ***Commonwealth v Verwayen*** (412), (416), (429), (454), (462), (487), (501)). In those cases the relief may sometimes reflect the value of the promise inherent in the representation or conduct rather than require the performance of the promise or non-departure from the assumption or expectation (See, albeit in the context of proprietary estoppel: ***Giumelli v Giumelli*** [50] - [51]; ***Sidhu v Van Dyke*** [84] - [85]).

Representation

178 The language used in Dr Frazer's email reply to Dr Phillips' Letter went beyond equivocal support. The Health Service rightly conceded that one could 'read that language as being a fait accompli', and I do. Premised on support being given by Dr Masters, which it was, Dr Frazer's email amounted to approval. Witnesses gave evidence that Dr Frazer was either the head of the hospital or of the relevant health service at the relevant time. On any view, Dr Frazer was clearly a very senior decision maker. In my view, Dr Frazer approved Dr Phillips' proposal, which included the SARC Pay Scale. Dr Frazer approved the SARC Pay Scale. Another very senior employee, Dr Masters, supported the SARC Pay Scale and once approved went on to explain how it would be implemented. The evidence shows the SARC Pay Scale was implemented in that way for 11 years.

179 Dr Masters told Dr Phillips to inform him when SARC doctors became eligible for an increase in level. Dr Frazer told Dr Masters to let Ms Paula Chatfield (Director of Psychological Medicine, Clinical Care Unit) know the outcome so that she could inform the staff.

180 In the circumstances, I consider that the SARC Pay Scale amounted to a representation by the Health Service that the SARC doctors would progress up the pay levels as they achieved the corresponding academic and/or caseload milestones (**Representation**). The Representation was clear, unambiguous and without time limit.

Approval/authorisation

181 The evidence given by the Health Service's witnesses in relation to above industrial agreement payments was limited, predominantly focusing on the fact that such payments occurred, rather than how they were (or should have been) authorised. At its highest, Mr Salvage's evidence was that if an above industrial agreement payment was agreed to, it would have been 'pursuant to some sort of delegated authority.' When invited to do so, the Health Service declined to put its delegation schedules to Mr Salvage.

182 Critically in my view, Mr Salvage said that Dr Frazer was the head of the relevant health service at the time (which was separate from the North Metropolitan Health Service) and that the head of the health service had authority to approve above industrial agreement payments.

183 The delegation schedules present difficulties for the Health Service's case. At the hearing the Health Service initially referred to what it said were extracts of delegation schedules that applied from 2005 to 2013. Those extracts contained some but not all Tier 2 delegations. They did not contain any Tier 1 delegations. As noted at [149], the Health Service later handed up two documents, the 2005 Delegation Schedule and the 2013 Delegation Schedule. It is apparent that the extracts of the delegation schedules that the Health Service initially referred to are extracts from the 2005 Delegation Schedule, which refers to North Metropolitan Area Health Service.

184 The Health Service says Dr Frazer was Tier 2 as Area Executive Director.

185 How the 2005 Delegation Schedule relates to SARC was not explained and is not apparent on the face of the document.

186 The services and position titles the 2005 Delegation Schedule refers to do not correlate to the particular service and position titles relevant to this matter.

187 Mr Salvage's evidence was that in 2007 Women and Newborn Health Service/King Edward Memorial Hospital were their own health service, separate from the North Metropolitan Health Service. I consider that evidence establishes that Dr Frazer was Area Chief Executive for the health service that employed Dr Smith and Dr Farrington.

188 The 2005 Delegation Schedule lists six Tier 2 roles. They are Area Executive Director for Sir Charles Gairdner Group, Finance and Corporate Services, Medical, Mental Health, Nursing and Population Health and Ambulatory Care. There is no mention of Area Executive Director of Princess Margaret Hospital, King Edward Memorial Hospital, Women and Newborn Health Service or Women and Children's Health Service.

189 The 2005 Delegation Schedule includes organisational charts headed 'Hierarchical Structure for NMAHS Authorities, Delegations and Directions'. They are broken into area divisions and services, including Sir Charles Gairdner Group, Finance and Corporate Services, Medical, Mental Health, Nursing and Population Health and Ambulatory Care. There is no mention of SARC, Princess Margaret Hospital, King Edward Memorial Hospital, Women and Newborn Health Service or Women and Children's Health Service.

190 The Health Service also tendered as a business record the 2013 Delegation Schedule. Women and Newborn Health Service appears in that document. It refers to 14 Tier 2 roles, including Executive Director – Women and Newborn Health Service. Women and Newborn Health Service appears on the organisational charts on page 154. But the 2013 Delegation Schedule is not relevant to what happened in 2007.

191 At the hearing the Health Service tendered a bundle of documents it said were business records. The first document in that bundle is headed 'Department of Health – Approval to fill a position' dated 16 March 2004, requesting medical officers Level 15 – 17 for SARC. That document notes that SARC is a section within the Women and Children's Health Service.

192 While it appears from the 2013 Delegation Schedule that by 2013 SARC was part of North Metropolitan Health Service, based on the oral evidence and documents, including the 2005 Delegation Schedule, I cannot make a finding that in 2007 SARC was part of North Metropolitan Area Health Service.

193 But even if I am wrong about that, I do not consider that it would make a difference to the outcome in this case. This is because even if the 2005 Delegation Schedule did apply to SARC, that would not lead to me drawing the inference the Health Service submits I should draw.

194 I do not consider that because the 2005 Delegation Schedule provides that only the Chief Executive can make classification changes and appoint to the Consultant position, that necessarily means that only the Chief Executive can agree to pay a practitioner above the industrial agreement. The delegation schedule says nothing about above industrial agreement payments. Above industrial agreement payments are not the same as classification changes or appointments to Consultant positions.

195 It was clear from Mr Salvage's evidence that the Chief Executive was aware that employees below the Chief Executive level offered contracts of employment at above industrial agreement pay rates to an employee of the Health Service, namely Dr Kelly. Mr Salvage seemed unsurprised and unconcerned that two above industrial agreement contracts were offered to Dr Kelly by someone other than him, the Chief Executive. His lack of surprise and concern about, and explanation for, that practice supports the inference that it is a practice that happened in relation to SARC and other areas of the Health Service.

196 The Health Service's own submission about who had actual authority to make the Representation was unclear, saying it would 'need to be at a high level of authority' and it 'might' be the Chief Executive.

197 The evidence shows that above industrial agreement payments were not unusual. Mr Salvage said that arrangements like the SARC Pay Scale were not all that unusual and above award payments to address medical workforce shortages were a longstanding practice between 2000 and 2010. Further, Mr Salvage's lack of concern about Dr Kelly twice being offered a contract that was not approved by the Chief Executive at above industrial agreement pay rates, even after the very question of paying above industrial agreement pay rates was highlighted, rather undermines the Health Service's case that above industrial agreement payments must be approved by the Chief Executive.

198 I cannot accept the submission that the SARC Pay Scale was internal and 'not escalated outside of the confines of the SARC area'. The SARC Pay Scale was escalated to Dr Frazer, the person who was, on the evidence, the most senior employee at the Women and Children's Health Service.

199 Even if I were persuaded that the only person with actual authority to make the Representation by approving the SARC Pay Scale was the Chief Executive and that Dr Frazer was not the Chief Executive, I am not persuaded that actual authority is necessary for an estoppel to arise.

200 The Health Service says that estoppel can only arise where the representation is made by a person with actual authority and relies on ***Lysaght*** and the reasoning of Brennan J in ***Legione v Hateley*** for that proposition. Brennan J cites ***Lysaght***, saying: 'A principal is not bound by an act of an agent who declares that he has no authority from his principal to bind him by that act.'

201 ***Lysaght*** involved a claim for breach of contract. Griffith CJ noted at 427-428 that:

> When an action is brought by a plaintiff against a defendant on a contract, he must prove that the contract was made, and, if the contract was made by an agent, he must prove the authority of the agent to make it… It may be done by showing that the agent had express authority to make that contract, or it may be done by giving evidence to show that *prima facie* he had authority to make contracts of that kind.

202 In ***Lysaght*** the party seeking to uphold the contract was unsuccessful because that party knew that the agent had no authority and was acting in his own interests, rather than in his employer's interests. Barton J noted at 439 that the contract was entered into not on behalf of the employer but for and to the mutual advantage of the other party and the agent, 'for reward to the [agent] and to the profit of the [other party], at the expense of [the employer]'.

203 It cannot be said that the SARC Pay Scale was for reward to Dr Frazer (or any other Health Service employee involved in approving the SARC Pay Scale). Rather, the SARC Pay Scale was implemented on behalf of the Health Service and to the benefit of the Health Service.

204 O'Connor J in ***Lysaght*** at 439 also focused on the dishonest exercise of authority:

> Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of the principal. That is a condition precedent to the right of exercising it, and if that condition is not fulfilled, then there is no authority, and any act purporting to have been done under it, unless in a dealing with innocent parties, is void. Further, it is quite clear that if a person dealing with an agent has knowledge that there has been a fraudulent exercise of the authority, then as far as he is concerned, he is not allowed to say that the authority exists.

205 In this case, it is clear and the Health Service rightly conceded, that Dr Smith and Dr Farrington were innocent parties. They had no reason to think that in 2007 the SARC Pay Scale was anything other than approved by a person with authority. As I have noted at [178], Dr Frazer approved the SARC Pay Scale. There is no suggestion that she did so other than honestly, on behalf of the Health Service and to the benefit of the Health Service.

206 As the Health Service conceded at the hearing, ***Lysaght*** may be distinguished on its facts and I consider that it is.

Assumption and inducement

207 I agree with the AMA that by approving and applying the SARC Pay Scale from 2007 until 2018, the Health Service induced and maintained Dr Smith and Dr Farrington's assumption that if they obtained the academic qualification and/or caseload milestone, they would be paid in accordance with the SARC Pay Scale while working at SARC. Their assumption was based on Dr Frazer accepting Dr Phillips' proposal, approving the SARC Pay Scale and telling Dr Masters to implement it. It was reinforced by the Health Service's senior executives applying the SARC Pay Scale for 11 years. For example, Dr Smith moved up to Level 20 when she received her Graduate Diploma in Clinical Forensic Medicine in 2015 and was offered a five year contract as a SMP at Level 20 in August 2015. Dr Farrington moved up to Level 19 in November 2011 and to Level 20 in July 2012 when she achieved her Graduate Certificate in Clinical Forensic Medicine. She was offered a five year contract as a SMP at Level 20 in August 2015.

208 It was not a case of this being conduct by a single employee or a group of employees within SARC. At least seven senior employees of the Health Service outside of SARC, including Dr Frazer, Dr Masters, Dr Salmon, Dr Boardley, Dr Jana, Ms Chatfield and Dr Johns applied the SARC Pay Scale, for example when new contracts were issued to Dr Smith and Dr Farrington, when FTE amounts were varied for Dr Smith and Dr Farrington and when members of the Health Service's Medical Administration team arranged for Dr Smith and Dr Farrington to be paid in accordance with the SARC Pay Scale.

209 Even when the Health Service was investigating the Level 23 contract variations in 2017, in an email to the AMA, the Health Service's Acting Director Clinical Services noted that SARC doctors were authorised to be paid up to Level 21.

Reliance

210 The evidence of Dr Smith and Dr Farrington was unequivocal – the SARC Pay Scale was the reason they obtained the academic qualifications. I find they relied on the Representation. In the circumstances, their reliance was reasonable.

211 I consider that the Health Service intended for Dr Smith and Dr Farrington to act in reliance on the Representation. The purpose of the SARC Pay Scale was to encourage SARC doctors to obtain the academic qualifications and to carve out a career pathway at SARC. So much is clear from the Letter attaching the proposed SARC Pay Scale. Their performance review documents show that Dr Smith and Dr Farrington were encouraged by the Health Service to study forensic medicine and obtain the academic qualifications.

212 That the SARC Pay Scale was amended in 2008 and 2012 does not make a difference to this matter. The substance of the 2008 changes merely reflected what was in the industrial agreement when the SARC Pay Scale was approved. The evidence shows that the change to the numbering of the levels made no difference. What had been Level 20 in the industrial agreement became Level 21 in the industrial agreement, with no change in pay rate. This was reflected in the 2008 amendment to the SARC Pay Scale. In effect the levels in the SARC Pay Scale stayed the same. In 2012 the descriptions of the academic milestones were updated, but the substance of the academic milestones stayed the same.

Detriment

213 I accept that Dr Smith and Dr Farrington have suffered detriment as a result of their reliance on the Representation and assumption. There is what might be considered lesser detriment, such as formalising the wider scope of duties and responsibilities for those with the academic qualifications. Then there is the significant detriment of the costs they have incurred to obtain an academic qualification that does not reasonably transfer or translate into other professional opportunities in Western Australia. Those costs are financial, temporal, professional and personal. Dr Smith and Dr Farrington have spent tens of thousands of dollars, endured the requirements of a very onerous academic course and inflexible interstate travel requirements and sacrificed important time and special occasions with their families.

214 I accept and find that but for the SARC Pay Scale, Dr Smith and Dr Farrington would have made different career choices. Notwithstanding the submission that it would not have been realistic for Dr Smith and Dr Farrington to do so, given their commitments outside of work and stage of life, I accept their unequivocal and undisturbed evidence that they would have met the requirements of specialising in alternative fields of medicine. While specialising in alternative fields would likely still have involved a significant cost and time commitment, it would also have offered ongoing career and improved remuneration opportunities.

Does the Masters amount to ordinary CPD?

215 In my view, and on the evidence I find that, obtaining a Masters plainly goes well beyond ordinary CPD – it is an onerous, expensive, time consuming post-graduate qualification that is over and above what is necessary or reasonable to expect in the way of CPD.

Failure to avoid detriment on the part of the representor

216 I consider that the Health Service did not act to avoid Dr Smith and Dr Farrington suffering detriment when it withdrew the SARC Pay Scale. The Health Service did not fulfil the assumption it created by approving and implementing the SARC Pay Scale for over 11 years. It did not tell Dr Smith and Dr Farrington before they committed to SARC as a career and started to study forensic medicine that their assumption was mistaken or that the SARC Pay Scale could be reviewed and unilaterally withdrawn by the Health Service. If the Health Service considered that it needed approval for the SARC Pay Scale in accordance with AP 7 after May 2010, there is no evidence that the Health Service sought such approval.

Conclusion

217 I find that the elements of equitable estoppel are met.

Is the SARC Pay Scale an ARI?

218 The submission that the SARC Pay Scale 'significantly departs from Approved Procedure 7' does not assist the Health Service's case. The SARC Pay Scale was implemented three years before AP 7 issued. Further, and in any event, AP 7 applied to ARIs. While in part developed to address attraction and retention, I find the main purpose of the SARC Pay Scale was to provide a career pathway for SARC doctors that offered incentives for obtaining forensic medicine qualifications and improving the quality of service for patients and the broader community. For this reason the SARC Pay Scale recognised academic milestones and not simply caseload milestones. The SARC Pay Scale is not an ARI.

219 Even if the SARC Pay Scale were an ARI, in my view the estoppel would still arise.

Relief

220 Reliance on ***Ferguson v TNT Australia Pty Ltd*** to support an argument that an employer is free to withdraw an increase in remuneration at any time where no consideration is provided for that increase is of limited assistance. First, that case bears little resemblance to this one, relating as it did to a claim for a denied contractual benefit that the Commission found did not arise under the employee's contract of employment. Second, increases in remuneration in accordance with the SARC Pay Scale were provided when Dr Smith and Dr Farrington obtained the academic qualifications. If consideration was required, Dr Smith and Dr Farrington provided consideration by obtaining the academic qualifications.

221 I do not consider that the transaction implicit in the SARC Pay Scale can now be unwound in the way the Health Service seeks it to be. To do so would be inconsistent with the law and industrially unfair. I consider that it would fall well short of community expectations. It would not, to put it as the Health Service did, avoid the harm that would ensue if the assumption were departed from.

222 There can be no suggestion that Dr Phillips or any of the SARC doctors were 'acting on a frolic of [their] own': ***Deatons Proprietary Limited v Flew*** (1949) 79 CLR 370.

223 Departure from the assumed state of affairs would be unconscionable and it should not be allowed. In the circumstances of this matter, it would not be harsh for the Health Service to be held to the assumed state of affairs. The Health Service continues to benefit from Dr Smith and Dr Farrington's expertise, enhanced as it is by having obtained the Masters in Clinical Forensic Medicine. It would be unfair for Dr Smith and Dr Farrington, having relied on the assumption, 'held up their end of the bargain' and suffered detriment, to be paid less than what was promised.

224 The Health Service says it is unfair for Consultants to be paid the same as Dr Smith and Dr Farrington. I disagree. Those theoretical Consultants are paid in accordance with the Industrial Agreement and at the rate they agreed to accept. On its face, there is nothing unfair about that arrangement. Further, the Consultants who work at SARC have lesser credentialling at SARC and do not perform the higher level duties that Dr Smith and Dr Farrington perform. The Health Service rightly conceded that it cannot be said that those Consultants at SARC have more experience, expertise or qualifications than Dr Smith or Dr Farrington in the area in which they work.

Level 23 variations

225 I have considered the Health Service's submission that Dr Smith and Dr Farrington were paid at Level 23 from 8 April 2016 until the end of June 2021, which is several levels higher than the SARC Pay Scale and that they could not have expected to be paid at that level when they acted in reliance on the Representation. I agree, and consider that that must be taken into account. But even if the Level 23 increase was effected in 2016 in such a way as to avoid scrutiny, Dr Smith and Dr Farrington did not know anything about that. In the circumstances, Dr Smith and Dr Farrington had no reason to, and did not, think that there was anything untoward about being moved to Level 23. That Dr Smith and Dr Farrington were paid at Level 23 for five years, even though Level 23 was never part of the Representation, does not sufficiently address the detriment that they would suffer, or offset the unfairness that would arise, if the Health Service were to offer contracts at below the SARC Pay Scale (likely at Level 18 in accordance with the Industrial Agreement).

Flow on effects

226 This matter involves a very particular set of circumstances which are confined to a small number of people. I accept that there may be flow on effects to around five other doctors at SARC who may have relied on the Representation to their detriment in the same way. I have taken that into account in reaching this decision.

227 I consider that an estoppel should operate in this case.

The doctors have been poorly treated

228 In my view, the Health Service has dealt poorly and unfairly with the issue of whether SARC doctors ought to be paid in accordance with the SARC Pay Scale.

229 Dr Farrington gave evidence that in 2018, her pay was reduced from Level 20 to Level 18 at the antenatal clinic where she was also working. Dr Farrington did not understand why that had happened, so she made enquiries. She was told it was because of 'what's happening at SARC'. Dr Farrington asked what was happening at SARC and she gave evidence that a couple of weeks later she was sent a letter dated 18 May 2018. Dr Smith also received this letter. The letter informed them that their Level 23 contract variations would be withdrawn in early June and that at the expiry of their current contracts, all new contracts would 'align with the industrial award.' The effect of this would be a significant decrease in remuneration, from Level 23 to Level 18 of the Industrial Agreement.

230 A meeting was held with the SARC doctors after they received the letter. It was made clear by the Health Service that as well as the Level 23 contract variations being withdrawn, the SARC Pay Scale was also under review and it was likely that it would cease to exist. The AMA then filed this application at the Commission.

231 While the dispute was on foot, Dr Smith was called to a meeting with the Health Service mere weeks before her contract was due to expire in 2020. At this meeting, she was told that her next contract would be offered at Level 18 and that if she did not sign it, she would no longer be able to work at SARC. Dr Smith and Dr Farrington's evidence was that the handling of this issue has left them feeling undervalued and let down. Unsurprisingly, it has affected their level of trust in their employer. As Dr Smith explained: 'I almost feel kind of foolish that I kind of, you know, trusted in the, um, the system I suppose or the - the hospital executive'.

232 It is clear that Dr Smith and Dr Farrington are dedicated employees who care deeply about providing their patients and the Western Australian community with the highest quality service. The very poor treatment of Dr Smith and Dr Farrington is more than simply regrettable. It falls well short of the standard of management reasonably expected of the Health Service.

For how long should estoppel operate?

233 Having found that an estoppel should operate in this case, I must decide for how long.

234 I consider that the nature of the Representation means that their reliance has long-lasting and wide-reaching effects for Dr Smith and Dr Farrington.

235 I accept that had Dr Smith and Dr Farrington not relied on the Representation, they would have gone into other specialties. They would likely be paid above Level 23 of the Industrial Agreement. Dr Smith and Dr Farrington put in the years of work, effort, money and sacrifice to obtain the academic qualifications required by the SARC Pay Scale. I accept that those academic qualifications and the expertise they have gained working at SARC do not transfer to other equivalent senior doctor roles in Western Australia that would enable them to be paid at least at Level 21 of the Industrial Agreement.

236 I do not agree that Dr Smith and Dr Farrington could only reasonably rely on the Representation for the balance of the contract at the time the Representation was made. The nature of the commitment, time and expense involved in obtaining the academic qualifications undermines that argument. It is not reasonable to expect that the Representation could only be relied on for the life of the contract at the time. The SARC Pay Scale contemplated and rewarded a commitment that was well in excess of a single contract, particularly in circumstances where SARC's staffing profile involved Dr Smith and Dr Farrington working small FTE fractions with a significant on-call commitment.

237 The Health Service undertook to offer, and I understand that it has now offered, Dr Smith and Dr Farrington each a five year contract from 1 July 2021 to 30 June 2026.

238 I cannot accept the Health Service's submission that an estoppel should not operate beyond the life of those contracts. Given the nature of the detriment caused by the reliance, to limit the estoppel to operate until 30 June 2026 would not satisfy the equity in the circumstances.

Conclusion

239 The answer to the question set out at [12] is 'yes'. Application PSACR 17/2018 is upheld.

240 Acting in accordance with equity, good conscience and the substantial merits of the case, and having regard to the interests of the parties, I consider that the fair and just way to resolve what is in dispute between the parties is to declare that the Health Service is estopped from offering a further contract to Dr Smith and Dr Farrington at a lower pay level than Level 21 as set out in the SARC Pay Scale. That outcome prevents unconscionability and is proportionate to the detriment it seeks to avoid. It is the minimum needed to do justice between the parties.

241 A declaration will issue accordingly.

242 I will hear from the parties about whether any consequential orders should issue.

2021 WAIRC 00527

DISPUTE RE CONTRACT VARIATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 6 OCTOBER 2021
FILE NO.	PSACR 17 OF 2018
CITATION NO.	2021 WAIRC 00527

Result	Declaration made
Representation	
Applicant	Ms J Auerbach (of counsel)
Respondent	Mr R Andretich (of counsel)

Declaration

HAVING heard Ms J Auerbach (of counsel) on behalf of the applicant and Mr R Andretich (of counsel) on behalf of the respondent;

AND HAVING given reasons for decision;

NOW THEREFORE the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), declares –

THAT North Metropolitan Health Service is estopped from offering a further contract to Dr Smith and Dr Farrington at a lower pay level than Level 21 as set out in the SARC Pay Scale.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

UNIONS—Matters dealt with under Section 66

2021 WAIRC 00483

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE TILBURY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 27 AUGUST 2021
FILE NO.	PRES 2 OF 2021
CITATION NO.	2021 WAIRC 00483

Result	Directions issued
Representation	
Applicant	In person
Respondent	Mr P Hunt

Direction

HAVING heard Mr G Tilbury on his own behalf and Mr P Hunt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

(1) THAT the applicant shall file an amended application by 3 September 2021.

(2) THAT the respondent shall file a response to the amended application by 10 September 2021.

(3) THAT each party shall give an informal discovery by serving its list of documents by 17 September 2021 with inspection to be completed seven days thereafter.

(4) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing.

(5) THAT the matter be listed for hearing on a date to be fixed.

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

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

2021 WAIRC 00492

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE TILBURY
	APPLICANT
	-v-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 3 SEPTEMBER 2021
FILE NO/S	PRES 2 OF 2021
CITATION NO.	2021 WAIRC 00492

Result	Withdrawn by leave
Representation	
Applicant	In Person
Respondent	Mr P Hunt

Order

HAVING heard Mr G Tilbury on his own behalf and Mr P Hunt on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be withdrawn by leave.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2021 WAIRC 00196

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 31 MARCH 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REBECCA WOODS
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	WEDNESDAY, 7 JULY 2021
FILE NO.	APPL 16 OF 2021
CITATION NO.	2021 WAIRC 00196

Result	Directions issued
Representation	
Applicant	In person
Respondent	Mr S Pack of counsel

Direction

HAVING heard Ms R Woods on her own behalf and Mr S Pack 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 appellant's Response to the respondent's Notice Of Intention to Remove (at tab 71 Vol 2 reg 92 bundle) be taken to be the basis for the appellant's appeal against her removal.

(2) THAT any application to tender new evidence on the appeal under s 33R of the Police Act 1892 (WA) be filed by no later than 28 July 2021.

(3) THAT the respondent file an outline of submissions and any authorities upon which he intends to rely no later than 14 days prior to the date of hearing.

(4) THAT the appellant file an outline of submissions and any authorities upon which she intends to rely no later than seven days prior to the date of hearing.

(5) THAT the matter be listed for hearing for one day on a date to be fixed.

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

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

2020 WAIRC 01001

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY JAY EILIF FRANTZEN
	APPELLANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 23 DECEMBER 2020
FILE NO/S	APPL 63 OF 2020
CITATION NO.	2020 WAIRC 01001

Result	Order issued
Representation	
Applicant	No appearance required
Respondent	No appearance required

Order

WHEREAS on 15 December 2020 the appellant filed a notice of appeal to the Commission;

AND WHEREAS on 22 December the respondent applied to the Commission for an order extending the time for the filing of a response in respect of this appeal pursuant to reg 36(1) of the *Industrial Relations Commission Regulations, 2005*;

AND WHEREAS the Commission has considered the application for an extension of time for filing a response ex parte in Chambers;

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

THAT the time for the respondent to file a response be extended to 29 January 2021.

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2021 WAIRC 00082

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY JAY EILIF FRANTZEN
	APPELLANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	TUESDAY, 23 MARCH 2021
FILE NO.	APPL 63 OF 2020
CITATION NO.	2021 WAIRC 00082

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr T Pontre of counsel

Direction

HAVING heard the appellant on his own behalf and Mr T Pontre 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 appellant file amended grounds of appeal setting out why he says his removal from his position as a prison officer was harsh, oppressive and unfair within 14 days.

(2) THAT the respondent file any amended response within 14 days of service of the amended grounds of appeal.

(3) THAT the issue of the tender of new evidence by the parties be adjourned to a date to be fixed.

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

(Sgd.) S J KENNER,
Senior Commissioner,
[L.S.] On behalf of the Western Australian Industrial Relations Commission.

2021 WAIRC 00136

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY JAY EILIF FRANTZEN
	APPELLANT
	-v-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 14 MAY 2021
FILE NO/S	APPL 63 OF 2020
CITATION NO.	2021 WAIRC 00136

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr T Pontre of counsel

Order

HAVING heard Mr T Frantzen on his own behalf and Mr T Pontre of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

(1) THAT the appellant has leave to tender:

(a) the attached correspondence of Mr Keith Woods dated 17 April 2020; and

(b) the two attached screenshots dealing with sample collection.

(2) THAT the respondent has leave to tender witness statements of Ms Victoria Baylem, Mr Nigel Squirres and Ms Catherine Bennett on the question of the manner of the sample collection from the appellant.

(3) THAT the statements referred to in order 2 be filed and served on or before 28 May 2021.

(4) THAT the matter be listed for a hearing on a date convenient to the Commission and to the parties after 28 May 2021.

(Sgd.) S J KENNER,
Chief Commissioner,

[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2021 WAIRC 00530

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY JAY EILIF FRANTZEN
	APPELLANT
	-and-
	DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 8 OCTOBER 2021
FILE NO/S	APPL 63 OF 2020
CITATION NO.	2021 WAIRC 00530

Result	Order issued
Appearances	
Appellant	In person
Respondent	Mr S Pack of counsel

Order

HAVING HEARD Mr T Frantzen on his own behalf and Mr S Pack of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the name of the respondent be amended by the deletion of the name "Department of Justice" and the insertion in lieu thereof the name "Director-General Department of Justice".

(Sgd.) S J KENNER,
Chief Commissioner,
[L.S.] For and On behalf of the Western Australian Industrial Relations Commission.

2021 WAIRC 00208

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRISTINA SHAW
	APPLICANT
	-v-
	M CLINICA PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 9 JULY 2021
FILE NO.	B 41 OF 2021
CITATION NO.	2021 WAIRC 00208

Result	Directions issued
Representation	
Applicant	Ms A Kaczmarek as agent
Respondent	Mr C Kanther of counsel

Direction

HAVING heard Ms A Kaczmarek as agent on behalf of the applicant and Mr C Kanther 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 a response to the application within 14 days.

(2) THAT the matter be listed for hearing on a date to be fixed.

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

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

2021 WAIRC 00493

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEVI ROHAN
	APPLICANT
	-v-
	S&DH ENTERPRISES PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	TUESDAY, 7 SEPTEMBER 2021
FILE NO.	B 60 OF 2021
CITATION NO.	2021 WAIRC 00493

Result	Directions issued
Representation	
Applicant	Mr D Rafferty of counsel
Respondent	Mr J Parkinson of counsel

Direction

HAVING heard Mr D Rafferty of counsel on behalf of the applicant and Mr J Parkinson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

(1) THAT the applicant shall file and serve an amended application by 20 September 2021.

(2) THAT the respondent shall file and serve an amended response by 4 October 2021.

(3) THAT the applicant and respondent shall confer and file a statement of agreed facts and common questions requiring determination by 4 November 2021.

(4) THAT the applicant shall file and serve a written outline of submissions and any list of legislation and authorities upon which he intends to rely by 18 November 2021.

(5) THAT the respondent shall file and serve a written outline of submissions and any list of legislation and authorities upon which it intends to rely by 2 December 2021.

(6) THAT the applicant shall file and serve an outline of submissions and any list of any further legislation and authorities upon which he intends to rely by 16 December 2021.

(7) THAT the matter be listed for hearing for the first available date convenient to the Commission and the parties on or after 20 December 2021.

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

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

2021 WAIRC 00501

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROSS BLENKINSOP
	APPLICANT
	-v-
	OASIS MOBILE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 14 SEPTEMBER 2021
FILE NO.	B 67 OF 2021
CITATION NO.	2021 WAIRC 00501

Result	Direction issued
Representation	
Applicant	Mr R Blenkinsop
Respondent	Mr J Sandford

Direction

Having heard from the applicant on his own behalf, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), directs that the applicant file:

1. A copy of the document referred to at 2. on page 5 of his *Form 3 – Contractual Benefit Claim* by 21 September 2021; and
2. A document setting out the particulars of his claim by 21 September 2021.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2021 WAIRC 00502

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROSS BLENKINSOP
	APPLICANT
	-v-
	GEORGE DALE TRENENACK AND PAULINE JILL CLIFTON
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 14 SEPTEMBER 2021
FILE NO.	B 68 OF 2021
CITATION NO.	2021 WAIRC 00502

Result	Direction issued
Representation	
Applicant	Mr R Blenkinsop
Respondent	Mr G Trenenack

Direction

Having heard from the applicant on his own behalf, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), directs that the applicant file:

1. A copy of the document referred to at 2. on page 5 of his *Form 3 – Contractual Benefit Claim* by 21 September 2021; and
2. A document setting out the particulars of his claim by 21 September 2021.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2021 WAIRC 00514

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GHD PTY LIMITED
	APPELLANT
	-and-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	FULL BENCH
	CHIEF COMMISSIONER S J KENNER
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 22 SEPTEMBER 2021
FILE NO/S	FBA 3 OF 2021
CITATION NO.	2021 WAIRC 00514

Result	Order issued
Appearances	
Appellant	Mr P Yovich SC of counsel
Respondent	Ms T Hollaway of counsel

Order

This appeal having come on for hearing before the Full Bench on Tuesday 21 September 2021, and having heard Mr P Yovich SC, counsel on behalf of the appellant, and Ms T Hollaway, counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

1. THAT the Notice of Appeal filed on 8 June 2021 and the Amended Notice of Appeal filed on 28 July 2021 in the herein proceedings be and are hereby incorporated into the Appeal Books.
2. THAT the reproduced documents and photos as agreed between the parties in the herein proceedings and filed on 17 September 2021 be substituted for the documents in the Appeal Books at Section N Exhibit A1, Annexures C, D and E and Section R Exhibit R8, Annexure HB1.

By the Full Bench

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

2021 WAIRC 00522

REVIEW OF NOTICE - S.51A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONSOLIDATED PASTORAL COMPANY PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 6 OCTOBER 2021
FILE NO.	OSHT 4 OF 2021
CITATION NO.	2021 WAIRC 00522

Result	Direction issued
Representation	
Applicant	Mr A Phillips (of counsel)
Respondent	Mr A Hay (of counsel)

Direction

HAVING heard from Mr A Phillips (of counsel) on behalf of the applicant and Mr A Hay (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT each party to provide documents or materials requested by the other party by 19 November 2021, unless the party objects to provision of any of the documents requested, such an objection should be made by that party filing a Form 1A application with the Tribunal at the earliest opportunity and by no later than 19 November 2021;
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
4. THAT the applicant file and serve upon the respondent any witness statements and expert reports upon which it intends to rely by no later than 4 February 2022;
5. THAT the respondent file and serve upon the applicant any witness statements or expert report upon which it intends to rely by no later than 11 March 2022;
6. THAT the application be listed for a further directions hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2021 WAIRC 00523

REVIEW OF NOTICE - S.51A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HANCOCK PROSPECTING PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 6 OCTOBER 2021
FILE NO.	OSHT 5 OF 2021
CITATION NO.	2021 WAIRC 00523

Result	Direction issued
Representation	
Applicant	Mr A Phillips (of counsel)
Respondent	Mr A Hay (of counsel)

Direction

HAVING heard from Mr A Phillips (of counsel) on behalf of the applicant and Mr A Hay (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT all matters requiring to be served on either party or the Tribunal may be served by email on each parties' nominated email address and proof of service is by the email sent notification;
2. THAT each party to provide documents or materials requested by the other party by 19 November 2021, unless the party objects to provision of any of the documents requested, such an objection should be made by that party filing a Form 1A application with the Tribunal at the earliest opportunity and by no later than 19 November 2021;
3. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as evidence in chief;
4. THAT the applicant file and serve upon the respondent any witness statements and expert reports upon which it intends to rely by no later than 4 February 2022;
5. THAT the respondent file and serve upon the applicant any witness statements or expert report upon which it intends to rely by no later than 11 March 2022;
6. THAT the application be listed for a further directions hearing on a date to be fixed; and
7. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2021 WAIRC 00518

REVIEW OF DECISION - S.61A - OSH ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW PAUL NYLUND
	APPLICANT
	-v-
	GOVERNMENT OF WESTERN AUSTRALIA WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 28 SEPTEMBER 2021
FILE NO.	OSHT 6 OF 2021
CITATION NO.	2021 WAIRC 00518

Result	Directions issued
Representation	
Applicant	Mr A Nylund
Respondent	Ms A Sukoski (of counsel)

Direction

HAVING heard from the applicant in person and Ms A Sukoski (of counsel) on behalf of the respondent, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) and the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT each party shall give informal discovery by serving its list of documents on each other by no later than 6 October 2021;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 20 October 2021
3 THAT the applicant file and serve upon the respondent any outline of witness evidence upon which they intend to rely by no later than 3 November 2021
4 THAT the respondent file and serve upon the applicant any signed witness statements upon which they intend to rely by no later than 17 November 2021
5 THAT the respondent's evidence in chief in this matter be adduced by signed witness statements which will stand as the evidence in chief on this matter;
6 THAT the applicant give notice to the respondent of witnesses they require to attend at the proceedings for the purposes of cross-examination by no later than 1 December 2021
7 THAT the matter be listed for hearing for 1 day on a date to be fixed
8 THAT the parties have liberty to apply on short notice

(Sgd.) T B WALKINGTON,
[L.S.] Commissioner.

2020 WAIRC 00202

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANWELL PTY LTD
	APPLICANT
	-v-
	MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	THURSDAY, 9 APRIL 2020
FILE NO.	PRES 5 OF 2019
CITATION NO.	2020 WAIRC 00202

Result	Direction issued
Representation	
Applicant	Mr B Holt
Respondent	Ms K Jones

Direction

HAVING heard from Mr B Holt on behalf of the applicant and Ms K Jones on behalf of the respondent, the Commission, pursuant to powers conferred under the *Industrial Relations Act 1979*, directs –

1. THAT by 4:00 PM Tuesday, 28 April 2020, the applicant file the following:
   a) an outline of submissions including its claim, the arguments in support of the claim and confirmation of the orders sought;

b) a list of witnesses it intends to call and, for each witness, an outline of the evidence to be given by the witness; and

c) an electronic file of documents that the applicant intends to refer to. The file is to be paginated and indexed.

2. THAT by 4:00 PM Monday, 4 May 2020, the respondent file the following:

a) an outline of submissions, including its response, its arguments in support of its response and what it says ought be the orders to be issued by the Commissions;

b) a list of witnesses that it intends to call and, for each witness, an outline of the evidence to be given by the witness; and

c) an electronic file of documents that the respondent intends to refer to. The file is to be paginated and indexed.

3. THAT the matter be set down for hearing for one day, on Tuesday, 12 May 2020.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2020 WAIRC 00266

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANWELL PTY LTD
	APPLICANT
	-v-
	MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	FRIDAY, 8 MAY 2020
FILE NO.	PRES 5 OF 2019
CITATION NO.	2020 WAIRC 00266

Result	Direction Issued
Representation	
Applicant	Mr B Holt, as agent
Respondent	Ms K Jones, as agent

Direction

On Monday, 27 April 2020, the applicant requested an extension of time in order to meet the requirements of Direction 1 of the Direction made on 9 April 2020 ([2020] WAIRC 00202). This extension of time was requested on the basis that the Covid-19 virus has greatly impacted the workload of the applicant. The respondent does not oppose the granting of the extension.

Having considered the circumstances, I am satisfied that such an extension ought to be granted.

NOW THEREFORE, the Chief Commissioner, pursuant to powers conferred under the *Industrial Relations Act 1979*, directs -

1. THAT Direction 1 of the Directions made on 9 April 2020 [2020] WAIRC 00202 be extended to 4:00 PM Thursday, 28 May 2020.

2. THAT Direction 2 of the Directions made on 9 April 2020 [2020] WAIRC 00202 be extended to 4:00 PM Wednesday, 3 June 2020.

3. THAT the date of the hearing set out in Direction 3 of the Directions made on 9 April 2020 [2020] WAIRC 00202 be Tuesday, 9 June 2020.

(Sgd.) P E SCOTT,
[L.S.] Chief Commissioner.

2021 WAIRC 00505

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANWELL PTY LTD
	APPLICANT
	-v-
	MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	THURSDAY, 16 SEPTEMBER 2021
FILE NO.	PRES 5 OF 2019
CITATION NO.	2021 WAIRC 00505

Result	Directions issued
Representation	
Applicant	Ms C Brauer of counsel
Respondent	Ms M Brown of counsel

Direction

HAVING heard Ms C Brauer of counsel on behalf of the applicant and Ms M Brown of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

(1) THAT the applicant shall, in relation to the proposed amendment to application PRES 5/2019 dated 30 June 2020, file full particulars of the orders sought and the grounds in support thereof by 7 October 2021.

(2) THAT the respondent shall file an amended response within 21 days of service of the applicant's particulars of proposed orders sought.

(3) THAT the parties shall give an informal discovery by letter of request.

(4) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than three days prior to the date of hearing. The outline of submissions shall include the issue of the Commission's jurisdiction to make the orders sought under s 66 of the Act.

(5) THAT the matter be listed for hearing on a date to be fixed by the Commission.

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

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2021 WAIRC 00534

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANWELL PTY LTD
	APPLICANT
	-v-
	MASTER PLUMBERS AND GASFITTERS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	TUESDAY, 12 OCTOBER 2021
FILE NO.	PRES 5 OF 2019
CITATION NO.	2021 WAIRC 00534

Result	Amended direction issued
Representation	
Applicant	Ms J Grant of counsel
Respondent	Ms M Brown of counsel

Direction

WHEREAS this is an application pursuant to S66 of the *Industrial Relations Act 1979* (WA); and

WHEREAS on 16 September 2021 the Commission issued a direction [2021 WAIRC 00505]; and

WHEREAS on 8 October 2021 the Commission was advised that the parties had conferred and agreed on proposed variations to the direction; and

NOW THEREFORE the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

THAT pars 4, 5 and 6 of the direction be deleted and in lieu thereof there be inserted:

(4) THAT the applicant file and serve an outline of submissions and any list of authorities upon which it intends to rely no later than 21 days prior to the date of hearing. The outline of submissions shall include the issue of the Commission's jurisdiction to make the orders sought under s 66 of the Act.

(5) THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely no later than 14 days prior to the date of hearing. The outline of submissions shall include the issue of the Commission's jurisdiction to make the orders sought under s 66 of the Act.

(6) THAT the matter be listed for hearing for three days.

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

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

2021 WAIRC 00515

PARLIAMENTARY EMPLOYEES GENERAL AGREEMENT 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES), THE HON. ALANNA CLOHESY MLC, PRESIDENT OF THE LEGISLATIVE COUNCIL, THE HON. MICHELLE ROBERTS MLA, SPEAKER OF THE LEGISLATIVE ASSEMBLY, UNITED WORKERS UNION
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 24 SEPTEMBER 2021
FILE NO	PSAAG 3 OF 2021
CITATION NO.	2021 WAIRC 00515

Result	Order issued
Representation	
Applicant	Ms D Larson
First Respondent	Ms T Venning
Second and Third Respondents	Ms T Hunter and Ms P Traegde
Fourth Respondent	Mr P Bergesio

Order

HAVING heard from Ms D Larson on behalf of The Civil Service Association of Western Australia Incorporated, Ms T Venning on behalf of the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees), Ms T Hunter and Ms P Traegde on behalf of The Hon. Alanna Clohesy MLC, President of the Legislative Council and The Hon. Michelle Roberts MLA, Speaker of the Legislative Assembly and Mr P Bergesio on behalf of the United Workers Union (WA), the Public Service Arbitrator (Arbitrator), pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act), hereby orders –

1. THAT being satisfied that the true intention of the parties is that the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) not be a party to the proposed industrial agreement, the Arbitrator pursuant to s 41(3) of the Act requires the parties to vary the proposed industrial agreement by:
   (a) deleting reference to the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) from clause 3 and clause 69.
2. THAT pursuant to s 27(1)(j) of the Act, the Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) is struck out as a party to these proceedings.
3. THAT a substituted industrial agreement containing the amendment referred to in order 1 and any amendments addressing the matters raised in Schedule A to the Commission's correspondence of 28 July 2021 be filed on or before 1 October 2021.
4. THAT at the time of filing the substituted industrial agreement, an undertaking confirming only the changes referred to in these orders have been made should also be filed.
5. THAT the application for registration of the industrial agreement be determined on the papers.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] Public Service Arbitrator.

2021 WAIRC 00512

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETRA (JENNY) BRIGHT
	APPLICANT
	-v-
	ROBERT BOMBAK
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 20 SEPTEMBER 2021
FILE NO/S	U 62 OF 2021
CITATION NO.	2021 WAIRC 00512

Result	Order issued
Representation	
Applicant	Ms P Bright, on her own behalf
Respondent	Ms J Grant, Mr B Rippingale and Mr R Smith

Order

HAVING heard from Ms P Bright, in person, and Ms J Grant, of counsel and with her Mr B Rippingale and Mr R Smith on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the question of whether the applicant is an "employee" for the purpose of s 23A(1) of the *Industrial Relations Act 1979* (WA) be determined as a preliminary issue, on the papers.
2. THAT the respondent file a Statement of Facts and Documents it relies upon for the determination of the preliminary issue on or before 25 October 2021.
3. THAT the applicant is to advise the Commission of any dispute concerning the Statement of Facts and Documents on or before 1 November 2021.
4. THAT the respondent is to file its submissions on the preliminary issue on or before 15 November 2021.
5. THAT the applicant is to file her submissions on the preliminary issue on or before 29 November 2021.
6. THAT the parties have liberty to apply on short notice.

(Sgd.) R COSENTINO,
[L.S.] Senior Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
City of Kalamunda Operational Workforce Agreement 2021 AG 17/2021	10/14/2021	City of Kalamunda	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Commissioner T B Walkington	Agreement Registered
IdentityWA and United Workers Union Support Workers Agreement 2020-2023 AG 13/2021	09/13/2021	IdentityWA	United Workers Union (WA)	Commissioner T Emmanuel	Agreement registered
Parliamentary Employees General Agreement 2021 PSAAG 3/2021	10/13/2021	The Civil Service Association of Western Australia (Inc)	The Hon. Alanna Clohesy MLC, President of the Legislative Council, The Hon. Michelle Roberts MLA, Speaker of the Legislative Assembly, United Workers Union	Senior Commissioner R Cosentino	Agreement registered
Public Sector CSA Agreement 2021 PSAAG 4/2021	09/24/2021	Chemistry Centre (WA), Animal Resources Authority, Botanic Gardens and Parks Authority and others	Civil Service Association of Western Australia Incorporated	Senior Commissioner R Cosentino	Agreement registered

NOTICES—Union Matters—

2021 WAIRC 00541

NOTICE

APPL 30 of 2021

NOTICE is given of application APPL 30 of 2021 by Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth to the Commission in Court Session of the Western Australian Industrial Relations Commission (**WAIRC**) for an alteration of its registered rules (**the Rules**).

The proposed alteration to Rule 13 – Life Membership is detailed below. Proposed alterations are shown as ~~strikethrough~~ for deletions and underlining for additions.

RULE 13 – LIFE MEMBERSHIP

(1) Conference may confer life membership of the Union upon a financial member having not less than ~~twenty-five continuous~~fifteen years of membership of the Union whom Conference considers merits life membership by reason of long years of active and faithful service to the Union.

A copy of the Rules of the organisation and the proposed rule alterations may be inspected in the Registry on Level 17, 111 St Georges Terrace, PERTH WA 6000.

Any person who objects to the application and who, having given notice of that objection within the time and in the manner prescribed, satisfies the Commission in Court Session that the person has a sufficient interest in the matter, may appear and be heard in objection to the application.

Pursuant to regulation 69(5) of the *Industrial Relations Commission Regulations 2005* (WA) a notice of an objection in the approved form (Form 1A – Multipurpose Form) must be filed within 21 days of this notice. A Form 1A – Multipurpose Form is available on the WAIRC website at www.wairc.wa.gov.au under Applications & Forms.

K HAGAN,
Deputy Registrar.

27 October 2021