Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 2 WEDNESDAY 23 FEBRUARY, 2022 Vol. 102—Part 1

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—
102 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2021 WAIRC 00655

APPEAL AGAINST A DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL GIVEN ON 18 MAY 2021 IN MATTER NO. OSHT 5 OF 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2021 WAIRC 00655
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
HEARD	:	TUESDAY, 21 SEPTEMBER 2021
DELIVERED	:	WEDNESDAY, 22 DECEMBER 2021
FILE NO.	:	FBA 3 OF 2021
BETWEEN	:	GHD PTY LIMITED Appellant AND WORKSAFE WESTERN AUSTRALIA COMMISSIONER Respondent

ON APPEAL FROM:

Jurisdiction	:	**Occupational Safety and Health Tribunal**
Coram	:	**Commissioner T Walkington**
Citation	:	**2021 WAIRC 00135**
File No	:	**OSHT 5 OF 2019**

Catchwords	:	Industrial Law (WA) - Occupational Safety and Health Tribunal - Appeal against the decision of the Tribunal - Whether Tribunal erred in law and fact - Scope and content of a designer's duty of care - Whether reg 3.140 of the *Occupational Safety and Health Regulations 1996* is constrained by s 23 of the *Occupational Safety and Health Act 1984* - Relevant principles of interpretation - Principles applied

Legislation	:	*Anti-Discrimination Act 1977* (NSW) s 108(1)(b) *Environmental Protection Act 1986* (WA) s 65(2)(b), s 68A *Industrial Relations Act 1979* (WA) s 26, s 26(1) *Interpretation Act 1984* (WA) s 46 *Mines Safety and Inspection Act 1994* (WA) s 31AG *Occupational Safety and Health Act 1984* (WA) s 23, s 23(1)(c), s 23(3a), s 23(3a)(a), s 23I, s 24, s 35A, s 48, s 48(1), s 41(1)(a), s 41(1)(b), s 48(2), s 48(4), s 48(5), s 48(6), s 49(5), s 49(6), s 50, s 51, s 51(1)(b), s 51(5), s 51A(5), s 51A(5)(b), s 60, s 60, s 60(1), s 60(2) *Occupational Health, Safety and Welfare Act 1986* (SA) *s* 24 *Occupational Safety and Health Regulations 1996* (WA) reg 3.137, reg 3.138, reg 3.139, reg 3.140, reg 3.140(2), reg 3.140(2)(a), reg 3.140(2)(a)(ii)
Result	:	Appeal upheld
Representation:		
Counsel:		
Appellant	:	Mr P Yovich SC of counsel and with him Mr S Puxty of counsel
Respondent	:	Ms T Hollaway of counsel
Solicitors:		
Appellant	:	Cantle Carmichael Legal
Respondent	:	WorkSafe Western Australia

Case(s) referred to in reasons:

Alcoa of Australia Limited v Andrew Chaplyn [2019] WAIRC 00011; (2019) 99 WAIG 93

Australian Medical Association (WA) Incorporated v The Minister for Health [2016] WAIRC 00699; (2016) 96 WAIG 1255

Australian Unity Property Ltd v City of Busselton [2018] WASCA 38

Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environmental Regulation [2018] WASC 263

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

Dickinson v Motor Vehicle Insurance Trust [1987] HCA 49

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181

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

House v King (1936) 55 CLR 49

King Gee Clothing Co Pty Ltd v The Commonwealth and Canns Pty Ltd v The Commonwealth [1946] HCA 5; (1946) 71 CLR 210

Medical Board of Australia v Woollard [2017] WASCA 64

Programmed Industrial Maintenance v The Construction Industry Long Service Leave Payments Board [2021] WASCA 208

Qantas Airways Ltd v Gubbins and Others (1992) 28 NSWLR 26

Re Lawrence; ex parte Goldbar Holdings Pty Ltd (1994) 11 WAR 549

Slivak v Lurgi (Australia) Pty Ltd [2001] HCA 6; (2001) 205 CLR 304

Television Corporation Ltd v Commonwealth [1963] HCA 30; (1963) 109 CLR 59

Town of Port Hedland v Hodder (No 2) [2012] WASCA 212; (2012) 43 WAR 383

Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2; (2019) 266 CLR 428

Wormald Security Australia Pty Ltd v Peter Rohan Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Reasons for Decision

THE FULL BENCH:

Background

1 The appellant, GHD Pty Limited provides consultancy services to clients in a range of areas including engineering design, architecture, environmental and construction services. CIVMEC Holdings, a construction company, engaged the appellant to design a ship building facility in Henderson, Western Australia. The facility to be constructed included a surface treatment shed and a 500-bay multi-storey carpark. As part of the design, precast hollowcore concrete panels were to be used in the construction of the floor of the ship assembly hall. The panels were large, each being 8.7 m long and 1.2 m wide, and weighing three tonne.

2 The installation of the panels was performed by a subcontractor engaged by CIVMEC, Above All Rigging. They were required to lift the panels from a trailer and install them in the floor of the building under construction. On 18 February 2019, during a lift, one of the panels fell to the floor, destroying the panel and damaging the floor.

3 An Inspector from WorkSafe attended the site and as a result of his inspection, an Improvement Notice was issued against the appellant on 26 February 2019 under s 48(1) of the *Occupational Safety and Health Act 1984* (WA). In issuing the Improvement Notice, the Inspector formed the opinion that as a designer, the appellant had failed to comply with reg 3.140 of the *Occupational Safety and Health Regulations 1996* (WA), in that it had not included in a written report to its client, CIVMEC, the hazards in relation to the use of the hollowcore panels in its design, and what the appellant had done, or not done, to reduce the risks. On an application to have the Improvement Notice reviewed by the respondent under s 51 of the *OSH Act*, by a decision dated 15 May 2019, the date for compliance was changed, but otherwise the Improvement Notice was affirmed.

4 An application to review was filed by the appellant in the Tribunal on 22 May 2019. In its order of 18 May 2021, the Tribunal affirmed the Improvement Notice with modifications. The existing directions were replaced by a direction to the effect that the appellant inserts in its Report under reg 3.140 of the *Regulations*, the hazard of hollowcore panels falling when being lifted by a crane.

5 It was common ground that the construction at the Project at Henderson was completed some time ago now, in mid-2019.

Proceedings at first instance

The application to review

6 The application to the Tribunal was made under s 51A of the *OSH Act* to review the decision of the respondent. The Improvement Notice the subject of the application to review, issued to the appellant under s 51 of the *OSH Act*, was, formal parts omitted, in the following terms (see AB13):

> l. In relation to: Duties of Designers - Hazard Report
>
> at CIVMEC 16 NAUTICAL DR HENDERSON 6166 on 18 Feb 2019
>
> I have formed the opinion that you are contravening regulation 3.140(2) of the Occupational Safety and Health Regulations 1996 and the grounds for my opinion are: My investigation and discussion with Lead Structural Engineer Pim Birss revealed that you are a Designer at this Construction Site where you have incorporated the pre cast concrete hollowcore plank into the building design which you have not included in your safety in design report to your commercial client setting out the hazards of this design and what you the designer have done to reduce those risks and that this work is continuing to be done as part of the clients trade or business. I attended the construction site and saw the damaged pre cast concrete hollowcore plank Kieran O'Shea informed me is greater than 3 tonne, that has fallen at height when being lifted into position with a crane. This exposed Simon Maxwell and Matt Denasson to the hazard of being hit by a falling object
>
> You are required to remedy the above by no later than 19 Mar 2019 at 0000 hours.
>
> 2. You are directed to take the following measures:
>
> l] Ensure as the designer all aspects of reg 3.140 are raised with your client in a written report.
>
> 2] Refer to the Code of Practice Safe Design of buildings and Structures, 2008.
>
> 3] Refer to Section 23(3a) of the Occupational Safety and Health Act 1984

7 The matter was heard before the Tribunal on 22 and 23 July 2020. In an amended application to the Tribunal, the appellant contended as follows:

> **Background**
>
> 1. GHD Pty Limited **(GHD)** was engaged by CIVMEC to design a ship building facility including a surface treatment shed and 500 bay multistorey carpark at 16 Nautical Drive, Henderson **(Henderson)**.
>
> 2. In undertaking the design activities, GHD was required to comply with, inter alia:
>
> a. section 23(3a) of the *Occupational Safety and Health Act 1984* (WA) (the **Act**);
>
> b. reg 3.140 of the *Occupational Safety and Health Regulations 1996* (WA) (the **Regulations**); and
>
> c. Code of Practice Safe Design of Buildings and Structures 2008 (the **Code**).
>
> 3. Part of the design involved reference to the use of manufactured pre-cast concrete hollowcore panels as the basis for the flooring system. These panels are generic, "off the shelf" products that are not bespoke and are one of the most common products utilised in modern construction.
>
> 4. The design documentation provided to CIVMEC included the design drawings, associated specification notes and a safety in design report. In reference to the pre-cast panels, the design documents specified panel thickness and reinforcement strands. The Precast Specification notes specifically reference AS3850 Building Code of Australia - Concrete Notes and Specifications.
>
> 5. Relevantly, with respect to the precast panels the design documentation provided by GHD to CIVMEC included specification requirements on Drawing 6135525-010S002 Precast as follows:
>
> a. Note 2 provides that the panels have only been designed for installed conditions only;
>
> b. Note 3 provides specific design requirements for the precast unit supplier in relation to design of precast units "to provide satisfactory performance for stability, fire resistance, serviceability, strength during manufacture, handling, lifting, transport, erection and installation operations"; and

c. Note 8 requires the contractor to "submit workshop drawings showing the proposed details for design, manufacture, assembly, transport and installation of precast concrete elements including....equipment and methods of handling, lifting, transport including location of lifting points, maximum loads on lifting and bracing points".

6. The design documentation appropriately identified the relevant hazards or risks associated with the design and the control or elimination of those risks during the design process including providing guidance on how the structure might be constructed safely prior to concrete reaching design strength (as per the WA Code of Practice for Safe Design of Buildings and Structures 2008).

7. GHD had no role, expertise or control in:

   a. any construction activities at Henderson;

   b. the devising and implementing of the lift plan for the concrete panels at Henderson; or

   c. the actual lifting activities of the panels at Henderson.

8. CIVMEC was undertaking construction activities on the site at Henderson. On 18 February 2019, CIVMEC was overseeing the lift of one of the concrete panels when the panel fell out of the sling system and landed onto a concrete deck, destroying the panel and damaging part of the concrete deck. The root cause of the incident was a failure in the configuration of the slings utilised to undertake the lift - there was no equipment failure (or failure of the integrity of the slings).

Issue of Improvement Notice

9. WorkSafe WA issued an Improvement Notice to GHD (no: 45300297) (the **Notice**) in which the following directions were made:

   1] Ensure as *the designer all aspects of the reg 3.140 are raised with your client in* a *written report.*

   2] Refer to the Code of Practice Safe Design of buildings [sic] and Structures, 2008.

   3] Refer to section 23(3a) of the Occupational Safety and Health Act 1984

10. The Notice was to be complied with by 19 March 2019.

11. GHD sought a review of the Notice on 19 March 2019.

12. On 15 May 2019, WorkSafe WA affirmed the issue of the Notice (**Review**).

GHD's Contentions

13. In the issue of the Notice and consideration of the Review, GHD submits that:

   a. GHD was not in contravention of the Act;

   b. there were no reasonable grounds for forming an opinion that GHD was in contravention of the Act;

   c. The Notice was uncertain, vague and ambiguous for the following reasons:

      i. it failed specify the nature of the contravention by GHD of its duty as a designer under section 23 of the Act to ensure that the design of the structure did not, as far as practicable, expose persons properly constructing the structure to hazards (which GHD has the ability to control or eliminate);

      ii. it failed to identify how any act or omission by GHD exposed persons to the hazard of "being hit by a falling object";

      iii. it failed to specify how the written materials (within the meaning of regulation 3.140(2)) supplied by GHD to CIVMEC contravened the Regulations; and

      iv. it failed to include directions as to measures to be taken to remedy any alleged contravention with sufficient clarity.

Outcome Sought

14. GHD seeks a review of the circumstances relating to the Notice and for the Notice to be set aside.

Relevant evidence before the Tribunal

8 There was a considerable body of evidence before the Tribunal. The circumstances giving rise to the issuance of the Improvement Notice were set out in the evidence of Inspector Badham. He is an inspector with WorkSafe and was appointed to that position in 2017. Inspector Badham had extensive experience in the construction industry prior to his appointment as an Inspector. This included work with "tilt-up" concrete panels and concrete flooring systems. The precast hollowcore planks used in the Project, are precast, stressed planks or panels. They are usually 1200mm wide, and the thickness ranges from 150mm to 400mm. The planks contain hollow voids through which services such as plumbing and electrical cabling may be run. Once laid, a concrete layer of about 100mm is then applied over the top of the planks.

9 Inspector Badham gave evidence about the incident at the site. On 11 February 2019 he was informed that a concrete hollowcore panel had fallen on to the first level of the building being constructed when being lifted into position. No one was injured. He attended the office of CIVMEC, the appellant's client, and met with their representatives along with another WorkSafe inspector, Mr Razza. Inspector Badham led the inspection and the investigation in relation to the incident.

10 Inspector Badham proceeded to the location of the incident at the Project site with a CIVMEC representative, Mr O'Shea. He testified that he entered the building at ground level and saw damage to the underneath of the first floor level, with broken concrete on the ground. Mr O'Shea informed him that one of the precast concrete panels had fallen from its slings when it was being lifted by a crane into place. The ground floor and upper floor access areas had been observed to have been taped off. Inspector Badham took photos of the incident site. Copies of the photos taken by him were annexure HB1 to his witness statement at AB683-699.

11 Inspector Badham testified that he inspected the chains, webbing and slings used in the lifting of the hollowcore planks by the contractor All About Rigging. The outer sheath of the slings had some damage and Inspector Badham also noted that the slings appeared to be extended too far. Inspector Badham spoke to employees of AAR involved in the lifting of the load. The hollowcore plank that fell whilst being lifted was 8.7m long, 1.2m wide and weighed approximately 3.1 tonne. The plank was about seven metres in the air when it fell and on observing the fallen plank, Inspector Badham said that he saw the broken plank on the first floor area, with concrete rubble present.

12 On meeting with CIVMEC director Mr Fitzgerald and the appellant's structural engineer Mr Birss, Mr Birss informed Inspector Badham that the appellant did not give either CIVMEC or AAR any guidance material or provide lifting points on the hollowcore planks. He told Inspector Badham to ask the manufacturer of the planks, BGC, about this, and that the riggers (AAR) would know how to sling and lift the planks properly. Inspector Badham was told that the appellant was given some software to use to select the size and length of the hollowcore planks and then this was incorporated into the design.

13 Inspector Badham followed up his inspection with a request for documents from all the relevant parties, including the appellant. The appellant gave to Inspector Badham a copy of their "Safety in Design Report", which was the relevant "Hazard Report". On a review of this Hazard Report, Inspector Badham testified that whilst it referred to "suspended loads", no reference to lifting of the precast hollowcore panels and the hazard of them falling was made. Based on his investigation, Inspector Badham formed the opinion that the appellant had contravened reg 3.140 of the *Regulations* as the appellant did not identify in the Hazard Report the hazard of the suspended load of hollowcore planks, relevant risks and whether the appellant had, or had not, done anything to mitigate the risk. Inspector Badham formed the opinion that if a three tonne hollowcore plank was to fall, the likelihood would be that someone would be seriously injured or killed. Based on the foregoing, Inspector Badham issued the Improvement Notice to the appellant.

14 Evidence was also given by Mr Tonkin, the appellant's Manager Structures and Materials Technology and Technical Director – Structures. Mr Tonkin was the Project Manager for the design services at the Project. He was the Project Manager for the appellant in the delivery of design services to CIVMEC.

15 He outlined how the appellant had been invited to tender for the design of the Project and was subsequently awarded the contract. Mr Tonkin was responsible for the management of the design project. Part of this was responsibility to meet obligations as the designer. Evidence as to the Safety in Design process and the preparation of design documents, in accordance with the appellant's Safety in Design Operational Procedure, was given by Mr Tonkin. This included the preparation of a "Risk Register". This document had the purpose of referring to hazards and risks identified as part of the design process that may arise in the construction phase of the Project.

16 The Risk Register was sent by the appellant to CIVMEC in January 2019. The relevant documents, at exhibit A1 (AB361-489) comprised the Ship Assembly Hall Structural Notes Drawing no:61-35525-01-S002, and the Risk Management Register. Mr Tonkin referred to pars 6-8 of the "General Notes" and the "Safety in Design" reference in the Structural Notes, and item 2 "Working at Heights / Dropped Objects" in the Ship Assembly Hall – risk actions in the Risk Management Register.

17 Mr Tonkin said that the appellant did not design the hollowcore panels which were generic and widely used in large scale construction over the last 50 years or so. The appellant simply specified the size of the hollowcore panels to be used on the Project as a part of its design. He said that the role of the designer in this context was to specify the use of "off the shelf" products, such as the concrete panels. He also said that the Structural Drawing Notes submitted to CIVMEC by the appellant, included a requirement on the contractor and its subcontractors, to prepare workshop drawings which included equipment and methods of handling, lifting, transporting etc of the panels. He said that a designer is not experienced and does not have knowledge in the aspects of proper and safe lifting of concrete precast panels and therefore these requirements were passed on to the contractor. He did not consider that it was the responsibility of the designer to specify a particular brand of hollowcore panels or the method of installation unless this was a specified feature integral to the design.

18 Mr Airey is an expert in the field of structural engineering and forensic engineering. He gave evidence before the Tribunal as an expert witness. Mr Airey produced three reports in relation to the incident and in response to specific questions posed to him by the appellant's solicitors (see AB490-602; AB603-626; and AB636-659). Mr Airey, in his reports, including the most recent third report dated 17 March 2020 (exhibit A2 AB490-602), made observations in relation to the roles of various parties and specifically, his opinion as to the obligations imposed on the appellant. Mr Airey observed that the preparation and implementation of a lifting plan for the hollowcore concrete planks was the responsibility of the precast designers and relevant contractors as specified in the appellant's Drawings at item 8-precast. He referred to item 8 which referred to "Equipment and methods of handling, lifting, transport including location of lifting points, maximum loads on lifting and bracing points". Mr Airey contended therefore, that the obligation was on the precast panel designer and manufacturer to provide CIVMEC with advice and guidance on these matters, prior to their installation. He said that the appellant's role would be to oversee and check the final design proposed and that any temporary lifting arrangements would not damage the panels.

19 The actual lifting activities however, according to Mr Airey, would need to be reviewed by the owner/builder, being CIVMEC and a hazard assessment undertaken. Mr Airey went on to say that the appellant was not the designer of the hollowcore planks. He noted however, that it would be normal for the appellant as consulting designer, to provide quality checking and to monitor the construction process, to ensure that the design intent, as prescribed, was being met. Mr Airey drew a distinction between

the appellant's role as the designer and the avoidance of hazards during construction, the latter of which were the responsibility of CIVMEC and their subcontractors, involved in supplying and installing the hollowcore planks. Mr Airey noted the implicit hazard in the process of lifting very heavy items into position and the importance of appropriate handling to avoid both stressing the plank itself and to ensure industrial safety. In Mr Airey's opinion, this aspect of the safety in design rested with the supplier of the hollowcore planks and not the appellant.

20 Mr Airey specifically referred to the various items set out in the Risk Register and the General Notes to the Structural Drawings. He particularly referred to item 9 – Suspended Loads for the Ship Assembly Hall and item 17 – Suspended Loads for the Ship Assembly Hall and noted that neither contained specific reference to the lifting of precast concrete panels being identified as a hazard. He described this omission as "surprising as the precast panels are heavy and require very specific management to ensure safe placement" (AB498). He went on to note that this omission probably stemmed from the fact that the abbreviated specification contained in the appellant's Drawing no.61-35525-01-S002 Revision 4, under "precast", required the provision of shop drawings specifying equipment and methods of handling, transport, and erection for review by the appellant.

21 Mr Airey further added that the outcome of the investigation showing why the hollowcore panel fell, that being the angle of incidence of the sling which had changed, was something that could not possibly have been known by the appellant as the designer. The responsibility for this rested with those erecting the panels to ensure industrial safety.

The Tribunal's reasons for decision

22 The Tribunal considered the issues that it was required to decide were whether the Improvement Notice should be affirmed with or without modifications, or whether it should be revoked.

23 The Tribunal in its reasons, then set out the background circumstances of the incident; the issuance of the Improvement Notice; the application to review the issuance of the Notice to the respondent; and the relevant principles to apply in the context of s 23 of the *OSH Act* and reg 3.140 of the *Regulations*. The Tribunal then made findings and reached conclusions as follows:

(a) that the appellant, for the purposes of reg 3.137 of the *Regulations* was the "designer" for the Project;

(b) that reg 3.140 and s 23(3a) of the *OSH Act* should be read together and interpreted consistently to determine the scope of a designer's duty;

(c) for the purposes of the Project, the appellant designed the flooring system which incorporated the hollowcore precast panels as a specific feature of the design. The appellant as the designer, was in charge of the end product of the construction work, being the floor of the Ship Assembly Hall and the office area of the Project;

(d) the appellant's contentions that reference to the manufacture, and design etc of concrete panels in Division 9 Subdivision 1 of the *Regulations*, did not mean that the appellant was excused from liability in relation to addressing hazards arising from the use of hollowcore panels, as these obligations are distinguishable;

(e) the appellant's selection of the hollowcore panels for the flooring on the Project was "a matter of design" and this carried with it the obligation on the appellant to identify risks and hazards. Regulation 3.140 of the *Regulations* requires these matters to be incorporated into a written report for the client (CIVMEC). Such hazards, to be identified, do not need to be in the control of the designer but they need to be identified along with a statement as to what has been, or has not been done, to address the hazard;

(f) The relevant Code of Practice (*Code of Practice: Safe Design of Buildings and Structures 2008*) requires designers to identify and include in a Risk Register relevant hazards and specifically those from heavy or awkward prefabricated elements likely to create handling risks, such as the hollowcore panels;

(g) as the designer, it was for the appellant to include in the Risk Register for the project, specific reference to the hollowcore panels;

(h) as to the content of the documents provided by the appellant as the designer to CIVMEC:

(i) two documents were provided; the Risk Register and the "Structural Notes" as a cover sheet for the relevant drawings and specifications;

(ii) items 9, 17 and 20 of the Risk Register, dealing with suspended loads, did not specifically deal with the hazard of hollowcore panels falling when being lifted by a crane;

(iii) Mr Airey, the expert engaged by the appellant, noted in his Reports, the absence from the Risk Register of a reference to the hollowcore panels falling when being lifted, was surprising;

(iv) the Tribunal noted Mr Airey's comments as to the responsibility of the manufacturer of the hollowcore panels in designing them and of the installer in installing them. It would be for the appellant to review the manufacture and installation procedure, to ensure that the hollowcore panels were not stressed; and

(v) the Tribunal concluded from Mr Airey's evidence, that the Risk Register should have included specific reference to the hazard of the hollowcore panel installation on the Project.

(i) given the terms of s 48 of the *OSH Act*, Improvement Notices must be certain in their terms, as a condition of the valid exercise of the power to issue them;

(j) that reference to reg 3.140 of the *Regulations* and the COP in the Improvement Notice, without relevant parts of the COP being identified, meant that the directions in the Improvement Notice were not sufficient, but this did not mean the notice was invalid; and

(k) the Tribunal modified the notice, as noted above.

Statutory provisions

24 It is convenient to set out at this juncture, the relevant statutory provisions. The general workplace duties in Division 2 of the *OSH Act* include a duty on manufacturers etc in s 23. A duty exists on designers of any building or structure in the following terms:

> …
>
> (3a) A person that designs or constructs any building or structure, including a temporary structure, for use at a workplace shall, so far as is practicable ensure that the design and construction of the building or structure is such that —
>
> (a) persons who properly construct, maintain, repair or service the building or structure; and
>
> (b) persons who properly use the building or structure,
>
> are not, in doing so, exposed to hazards.

25 Provisions in relation to improvement and prohibition notices are set out in Part VI of the *OSH Act.* Relevantly, for improvement notices, their issue and effect is prescribed in s 48 which relevantly, is in the following terms:

> (1) Where an inspector is of the opinion that any person —
>
> (a) is contravening any provision of this Act; or
>
> (b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,
>
> the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.
>
> (2) An improvement notice shall —
>
> (a) state that the inspector is of the opinion that the person —
>
> (i) is contravening a provision of this Act; or
>
> (ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated;
>
> and
>
> (b) state reasonable grounds for forming that opinion; and
>
> (c) specify the provision of this Act in respect of which that opinion is held; and
>
> (d) specify the time before which the person is required, to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention; and
>
> (e) contain a brief summary of how the right to have the notice reviewed, given by sections 51 and 51A, may be exercised.

26 The jurisdiction of the Tribunal in relation to a review of notices, is dealt with in s 51A of the *OSH Act* and it relevantly provides as follows:

> (1) A person issued with notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.
>
> (2) A reference under subsection (1) may be made within 7 days of the issue of the notice under section 51(6).
>
> (3) A review of a decision made under section 51 shall be in the nature of a rehearing.
>
> (4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.
>
> (5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may —
>
> (a) affirm the decision of the Commissioner; or
>
> (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
>
> (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,
>
> and the notice shall have effect or, as the case may be, cease to have effect accordingly.
>
> *[(6) deleted]*
>
> (7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under section 51, the operation of the notice in respect of which the reference is made shall —
>
> (a) in the case of an improvement notice, be suspended; and
>
> (b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Tribunal.

27 There are comprehensive regulations set out in the *Regulations* dealing with the construction industry and hazard and safety management etc. It was common ground that in this case, the appellant was the relevant "designer" and CIVMEC was the relevant "client" for the purposes of the definitions set out at reg 3.137 of the *Regulations*. The scope and application of Division 12 of the *Regulations* is set out in reg 3.138 which relevantly provides as follows:

(1) This Division applies in relation to construction work taking place, or to take place, at a construction site.

28 Regulation 3.139 prescribes obligations on clients where work at a construction site is being done for the client as part of its trade or business, to consult with the designer, to ensure that as far as practicable, persons undertaking the construction work do so without risk to their health and safety. The key part of Division 12 for present purposes is reg 3.140 dealing with obligations on a designer to provide reports to a client and is in the following terms:

3.140. Designer of work for commercial client to give client report

(1) This regulation applies in relation to a client if the work at the construction site was, is being or is to be done for the client as part of the client's trade or business.

(2) The designer must give a written report to the client setting out —

(a) the hazards —

(i) that the designer has identified as part of the design process; and

(ii) that arise from the design of the end product of the construction work; and

(iii) to which a person at the construction site is likely to be exposed;

and

(b) the designer's assessment of the risk of injury or harm to a person resulting from those hazards; and

(c) what things the designer has done to reduce those risks (for example, changes to the design, changes to construction methods); and

(d) which of those hazards the designer has not done anything in respect of to reduce those risks.

Penalty: the regulation 1.16 penalty.

(3) The level of detail in the report must be appropriate for the client, the nature of the hazards and the degree of risk.

The appeal

29 There are two amended grounds of appeal. They are:

1. The Tribunal erred in law and in fact in affirming Improvement Notice 45300297 **(Notice)** with modifications by concluding that the Appellant was in breach of its duty as a designer pursuant to regulation 3.140 of the *Occupational Safety and Health Regulations 1996* (WA) **(OSH Regulations)** by not, or not adequately, referencing in a written report the hazards of pre-cast, hollowcore concrete panels **(panels)** falling when being lifted by a crane during the construction phase.

Particulars

(a) Regulation 3.140(2)(a) of the OSH Regulations requires a designer to give to a client a written report that sets out hazards that (inter alia) "arise from the design of the end product of the construction work".

(b) The phrase "arising from the design" requires some causal or consequential relationship between the design and the hazard.

(c) Section 23(3a)(a) of the Occupational Safety and Health Act 1984 (WA) (OSH Act) requires a person that designs or constructs a building or structure to (inter alia) ensure, so far as is practicable, that "the design and construction of the building or structure is such that persons who properly construct . . . the building or structure . . . are not, in doing so, exposed to hazards".

(d) Although the duty under regulation 3.140 is separate from the duty under s 23(3a), the two provisions are to be read together and interpreted consistently to determine the scope of the designer's duty, as the Tribunal correctly found.

(e) The Respondent did not allege in the Tribunal hearing that the Appellant exposed anyone to any hazards, in particular the hazard of the panels falling.

(f) There was unchallenged evidence that:

(i) the panels are a generic product in large scale construction that have been available in Australia for more than 50 years;

(ii) the Appellant did not design the panels; it merely chose them from a supplier's catalogue. There was no evidence that the choices made by the designer as to thickness and internal strand size of the panels had any effect on the hazard they would represent as falling objects; and

(iii) the Appellant had no expertise in the handling or installation of the panels.

(g) Given those facts, and the emphasised wording of regulation 3.140 and section 23(3a) identified in (a) and (c) above, the Tribunal erred in law and in fact in concluding that the Appellant had a duty to include a specific reference in a written report to the hazard of the panels falling.

2. The Tribunal erred in law in exercising its powers under s 51(1)(b) of the OSH Act to affirm the Notice with modifications, as the Notice was invalid by reason of it being uncertain, vague and ambiguous, and did not comply with the requirements of s 48(2) of the OSH Act, and further, affirming the Notice with modifications meant in circumstances where the installation of the panels at the building project in respect of which the Notice was issued had finished, that the affirmation of the Notice with modifications could not be given any practical effect.

Particulars

(a) The Tribunal correctly stated that an Improvement Notice must be certain in its terms as a condition of its valid exercise.

(b) The Tribunal found that the Notice was uncertain or ambiguous in these respects;

(i) it failed to specify the provision of the OSH Act under which it was issued, and that both s 48(1)(a) ands 48(1)(b) of the Act were capable of being applicable;

(ii) the directions in part 2 of the Notice were not sufficiently certain in that they did not specify the requirements imposed upon the Appellant, and that they failed to identify the relevant sections of the applicable Code of Practice; and

(iii) the time specified in the Notice was ambiguous.

(c) Those conclusions, in particular the first, mean that the Notice was not sufficiently certain in its terms to be valid as at the date of its issue, and that reasonable grounds for its issue in the terms in which it was issued did not exist.

(d) The Notice could therefore only be properly affirmed if modified.

(e) The evidence before the Tribunal, which it accepted, was that the installation of the flooring and the lifting of the panels had been completed by the middle of 2019.

(f) In those circumstances, the Tribunal erred in modifying the Notice so as to give it retrospective effect, when, on the evidence before the Tribunal, doing so could have no practical effect or utility.

Relevant principles

30 The proceedings at first instance, involved a challenge to the issuance by Inspector Badham of an Improvement Notice under s 48 of the *OSH Act*. By s 51A(5) of the *OSH Act*, the Tribunal is required to "enquire into the circumstances relating to the notice".

31 This requires, as the Tribunal correctly posited, that the Tribunal examine whether, on the facts and circumstances in existence at the material time, Inspector Badham was justified in forming the opinion that he did, in issuing the Improvement Notice to the appellant. In effect, the Tribunal "stands in the shoes" of the Inspector. Based on the evidence before the Tribunal, including any expert evidence a party may adduce, or the Tribunal itself arranges to be placed before it, the Tribunal is required to find for itself, whether it can form the opinion formed by the Inspector, that led to the issuance of the Improvement Notice: ***Wormald Security Australia Pty Ltd v Peter Rohan Department of Occupational Health, Safety and Welfare*** (1994) 74 WAIG 2 at 4 per Franklyn J (Ipp J agreeing). In proceedings before the Tribunal, there is no onus on the recipient of a notice issued under the *OSH Act*, on an application to review, to establish that the notice should not have been issued and should be revoked: ***Wormald*** per Franklyn J at 4 and Nicholson J at 11.

32 An appeal of the present kind from a decision of the Tribunal, exercising a discretion, involves the application of the principles in the well-known and oft cited decision of the High Court in ***House v King*** (1936) 55 CLR 49. The Full Bench may not interfere with such a decision unless it is demonstrated that the Tribunal made an error: ***Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*** [2000] HCA 47; (2000) 203 CLR 194. This may involve an error in terms of applying the wrong principle; mistaking the facts; failing to take into account relevant considerations or taking into account irrelevant considerations; or whether the decision is plainly unjust such that no reasonable Tribunal could make the decision that it did (see the explanation of these principles in ***Medical Board of Australia v Woollard*** [2017] WASCA 64).

Consideration

Ground 1

33 This ground raises an issue of the correct construction of reg 3.140. Specifically, whether, on a correct construction, that regulation requires the designer to expressly state in its written report provided to its client that the hazard of hollowcore panels falling from heights had been identified by the designer.

34 The appellant alleged that the Tribunal erred in law and in fact, in concluding that the appellant had a duty to include a specific reference in the written report to the hazard of panels falling. The Tribunal found in this regard at [49]:

> Regulation 3.140 requires a designer to provide a written report to a client that sets out the hazards the designer has identified as part of the design process, and that arise from the design of the end product of the construction work which is likely to expose a person at the construction site. The written report is to include the designer's assessment of the risk or injury or harm and whether the designer has done anything to reduce the risk or not done anything to reduce the risk. The level of detail in the report is a result of the assessment of the client, the nature of the hazard and the degree of the risk.

35 The Tribunal did not articulate any exercise of construction of reg 3.140. However, at [68] the Tribunal found that the regulation requires one written report. Then, at [65], relying upon the evidence of the appellant's expert, Mr Airey, the Tribunal concluded that the report ought to have included a specific reference to the precast hollowcore panels and the hazard arising from the installation of these panels in the flooring system. The Tribunal referred to Mr Airey's evidence to the effect that the

primary responsibility for controlling the hazards associated with the hollowcore panels lay with the manufacturer of those panels, but that he was surprised by the omission of a specific reference in the appellant's written report to the lifting of precast concrete panels as a hazard.

36 This ground misconstrues the Tribunal's reasoning by treating it as involving, at [65], the construction of reg 3.140.

37 On a fair reading of its reasons, the Tribunal does not find reg 3.140, properly construed, means the appellant had a duty to include a specific reference in its written report to the hazard of the panels falling. The Tribunal only referred to, and characterised, the relevant duty in the heading of the reasons as a "Duty to provide written report - Principles". The Tribunal did not construe reg 3.140 as prescribing any particular content of the written report being required. The only conclusion reached by the Tribunal on the construction of reg 3.140, was that the reference to the words "written report" means one written report. That part of the reasoning is not challenged in this appeal.

38 The construction of reg 3.140 cannot differ according to the nature and context of the circumstances of each case. This also reveals that it is a mistake to treat the Tribunal's reasons as involving the construction of reg 3.140, which this appeal ground attributes to them.

39 There is a degree of artificiality in this appeal ground to the extent that it characterises this issue as a construction issue rather than a challenge to a finding of fact. A more accurate characterisation of the reasoning and relevant finding is simply that the hazard of the panels falling was found to be one meeting the conditions of reg 3.140(2)(a), as a matter of fact. In upholding the Improvement Notice, the Tribunal did not attribute a particular contentious meaning to reg 3.140. The outcome resulted from findings of fact as to uncontentious and plain elements of the regulation.

40 The appellant finds a footing to raise an issue of construction because it made submissions about the correct approach to construction at first instance. However, its submissions at first instance did not properly raise an issue of construction either. In particular, its case at first instance was that the contravention alleged was outside the scope of a designer's duty in s 23, and that reg 3.140 must be construed together with s 23. The submission was that "a designer's duty is confined to hazards or risks *arising from the design*".

41 That contention is and was uncontroversial and merely reflects the express words of reg 3.140. It does not raise a controversy about the proper interpretation of them.

42 The substance of the appellant's submissions refer to what is and is not reasonably practicable for a designer to do within a designer's duty of care, not whether the hazard under consideration arises from design (see Applicant's Outline of Opening Submissions [98] to [111] at AB 93-112). In other words, having identified the limits of the duty by reference to "arising from the design", the appellant then raises the separate issue of the content of the duty by reference to the concept of reasonable practicability, but does so under the guise of construction. The appellant never fully addressed what is meant by "arising from the design" except perhaps when it submitted:

> A designer's duty is "limited to matters of design" and section 23(3a) and regulation 3.140 are, by their terms, confined in that way. (submissions paragraph 108, citing *Slivak v Lurgi* at [34]).

43 That submission takes the matter no further than rephrasing the express words of s 23 and reg 3.140 respectively.

44 When the High Court pronounced upon the scope and content of a designer's duty in issue in ***Slivak v Lurgi (Australia) Pty Ltd*** [2001] HCA 6; (2001) 205 CLR 304, namely, the statutory duty imposed by s 24 of the *Occupational Health, Safety and Welfare Act 1986 (SA)*, its determination centred on the concept of what is "reasonably practicable". At [37], Gleeson CJ, Gummow and Hayne JJ stated:

> The ordinary and natural meaning of the terms in par (a) of s 24(2a) is that they apply to a structure being built in accordance with the design. Thus, if, as designed, parts of a structure are incapable of bearing weight that the structure is intended to bear, or if, as designed, it is possible for parts of the structure to fall or break, or if the design is incapable of being built safely having regard to features of the location in which it is being built, then the design will be inadequate and the designer will have breached s 24(2a). The appellants stressed the presence of the term "must ensure". However, the requirement is one of ensuring safety "so far as is reasonably practicable". The requirement applies to matters which are within the power of the designer to perform or check, such as ascertaining what use the structure will be put to, what loads it will experience when being built and the nature of the location in which it is to be erected. This is in contrast to the matters that would be forced within the ambit of this requirement were the submissions for the appellants accepted; for then a designer would be required to take account of factors outside the power of the designer to control, supervise or manage, such as the procedures to be adopted during construction.

45 Gaudron J said at [53] to [54]:

> The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration [26]. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:
>
> - the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible" [27];
> - what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time [28];
> - to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk [29].
>
> For present purposes, what is reasonably practicable has to be considered at the time the tower was designed. Moreover, when considering what is reasonably practicable for the purposes of s 24(2a)(a) of the Act, it is relevant to consider that, in the ordinary course, the designer of a structure will have little or no control with respect to the work practices or the

> workmanship of those who undertake its construction. And it is also relevant to consider what may reasonably be expected of those persons. However, as will later appear, these are not the sole considerations.

46 Her Honour noted also at [63]:

> [T]he question whether there was a breach of that duty is, as already indicated, a matter of judgment having regard to all the facts.

47 The appellant's case did not, in substance, raise a construction issue. Its submissions addressed a controversy about whether a duty had been breached based on arguments about reasonable practicability. That controversy was resolved by the Tribunal's consideration and conclusions on the facts as found.

In the alternative

48 Even if the ground properly raises an issue of construction, for the following reasons, it fails. The appellant's argument concerning the construction of reg 3.140 is premised on the regulation being tied to an overarching duty derived from s 23 of the *OSH Act,* as discussed in ***Slivak***. This duty is often referred to as the "general duty", "duty of care" or "primary duty of care" (see for example Tooma, M, *Safety, Security, Health and Environment Law* p 53).

49 The appellant's submission was, in short, that the duty contained in reg 3.140 is a subset of the general duty under s 23 of the *OSH Act* and therefore cannot operate to extend the general duty but must be construed within its limits. Regulation 3.140 cannot be characterised in this way. We agree with the respondent's submissions to the effect that reg 3.140 stands independently of s 23 and the general duty imposed on designers by the *OSH Act.* In other words, while reg 3.140 imposes a duty (in the sense of it creating a legally binding obligation), it should not be construed as confined by a duty of care. Reference to any articulation of the limits of a designer's general duty of care, have no direct bearing on the application of the requirements imposed by reg 3.140.

50 The appellant characterised s 23 as creating the general duty and reg 3.140 as being a specific duty or subset of the s 23 general duty. It referred to ***Slivak*** as articulating the general duty of designers that arises under s 23, where Gleeson CJ, Gummow and Hayne JJ stated at [34] to [35]:

> Sub-section (2a) divides and allocates in pars (a)-(d) duties between those who design a structure, those who manufacture any materials to be used for its "purposes", those who import or supply any materials to be used for its "purposes" and those who undertake its erection. The difference in the content of the duties and their different scope of operation suggests that the duty imposed upon designers is intended to be limited to matters of design. To deal with examples raised during argument, it would not be incumbent on a designer to guard against a supplier of material or an erector incorporating substandard or inferior materials when constructing the design. The supplier or erector or both would be in breach of their own duty under the relevant paragraphs of s 24(2a). The express imposition of liability upon those parties for such acts suggests there is not to be implied in par (a) of s 24(2a) an imposition upon the designer in respect of the same matters.
>
> The same would follow in respect of the erection of a structure outside or otherwise not in accordance with its design. The imposition by par (d) of liability upon the person undertaking the erection of the structure suggests that the designer is not required by par (a) to anticipate errors or departures from design by the person undertaking the erection and to take steps to guard against it by modifying the design. The result of accepting submissions for the appellants would be to enlarge the scope of par (a) to cover the matters already dealt with in pars (b), (c) or (d). This would tend to distort the scheme of the Act and undermine its careful allocation of liabilities among the parties jointly responsible for the erection of a structure. It would also expose designers to criminal liability for a penalty of up to $50,000 in respect of matters not expressly mentioned in the statute. The court should be slow to interpret a law in a fashion which would impose criminal liability by a process of implication.

51 What the High Court was required to decide in ***Slivak*** was whether the statutory duty of care required Lurgi, as designer, to take reasonably practicable steps in respect of any reasonably foreseeable errors or variations from the design that might be made by the builder of a structure. Paragraphs [34]-[35] of the judgment relied upon by the appellant are steps in the High Court's reasoning to the conclusion in para [37], including observations by way of illustration. They do not themselves define a designer's duty of care.

52 The appellant emphasised the requirement in reg 3.140(2)(a)(ii), that the relevant hazards must "arise from the design" of the end product of construction. It submitted that the hazard of hollowcore panels falling while being lifted could not be regarded as a hazard arising from the design, and that this is a conclusion that is compelled by the respondent's concession that the appellant did not expose anyone to any relevant hazard. The respondent, on the other hand, submitted that reg 3.140 was not constrained by s 23 of the *OSH Act,* but is an independent and distinct source of an obligation to provide the written report referred to in the regulation. The respondent submitted that the construction of reg 3.140 need not import a limitation sourced from s 23 or the duty imposed by s 23.

53 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The applicable principles are well-known, and were summarised in ***Australian Unity Property Ltd v City of Busselton*** [2018] WASCA 38 as follows (citations omitted):

> The first aspect is the imperative to give primacy to the language which the legislating body has chosen to use. As the plurality observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

This focus on the statutory text may be seen as an aspect of the rule of law. It recognises and preserves the role of the legislature, acting within constitutional constraints, in identifying the policy which legislation is to pursue by requiring that effect be given to the chosen text. This point was noted by Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation:*

> The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature"... it may lead judges to put their own ideas of justice or social policy in place of the words of the statute.

Additionally, focus on the statutory text facilitates the comprehension of the meaning of legislation by persons whose conduct it regulates. As French CJ observed in *Alcan*:

> The starting point in consideration of the first question is the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose. That proposition accords with the approach to construction characterised by Gaudron J in *Corporate Affairs Commission (NSW) v Yuill* [(1991) [1991] HCA 28; 172 CLR 319 at [340] as: "dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage." In so saying, it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read. Context is here used in a wide sense referable, inter alia, to the existing state of the law and the mischief which the statute was intended to remedy.

54 Regard must also be given to the purpose and object of the text, to ascertain the intention of the legislature in making the law in question: ***Work Health Authority v Outback Ballooning Pty Ltd*** [2019] HCA 2; (2019) 266 CLR 428; See too: ***Programmed Industrial Maintenance v The Construction Industry Long Service Leave Payments Board*** [2021] WASCA 208.

55 The text of reg 3.140 is set out above. Notably, the appellant does not point to any particular context within the *OSH Act* beyond s 23 itself, nor the *Regulations*, to support its submission that reg 3.140 is confined by the limits of the duty created by s 23. In our view, the context indicates otherwise.

56 The scheme of the *OSH Act* is to, amongst other things, impose a general duty to protect safety and health at work, framed in terms of what is reasonably practicable. As such, the general duty is clearly one that approximates or approaches a statutory restatement of the common law duty of care, although commentators and the courts have often cautioned that the statutory duty, and common law duty are not identical: ***Drexel London (a firm) v Gove(Blackman)*** [2009] WASCA 181 at [214] and [268]; ***Town of Port Hedland v Hodder (No 2)*** [2012] WASCA 212; (2012) 43 WAR 383 per Martin CJ at [47]; and generally Foster & Apps *The neglected tort - breach of statutory duty and workplace injuries under the Model Work Health and Safety Law* (2015) 28 AJLL 57.

57 In the case of designers, the general duty is a duty to ensure, as far as is practicable, that the design and construction of buildings or structures is such that persons who properly construct, maintain, repair and service them, and those who later use them, are not, in doing so, exposed to hazards (see s 23(3a) *OSH Act* set out above).

58 In addition to creating and imposing general duties, the *OSH Act* also contains provisions, amongst others, imposing obligations relating to consultation with the workforce (s 24), compliance with improvement notices (s 48), notification of incidents (s 23I), and prohibitions on victimisation (s 35A).

59 Consistent with the manifold purposes of the legislative scheme, s 60 of the *OSH Act* permits the making of regulations prescribing all matters that are necessary or convenient to be prescribed for giving effect to the purposes of the *OSH Act.* Subsection 60(2) provides that, without affecting the generality of s 60(1), regulations may be made with respect to any of the matters specified in Schedule 1. Therefore, the first significant contextual indicator is the content and structure of Schedule 1. It contains 38 separate items setting out the matters with respect to which regulations may be made. It is sufficient to reproduce a selection of those items:

1. Safety and health standards or procedures to be complied with —

(a) at any workplace; or

(b) in the performance of any work; or

(c) in the use, cleaning, maintenance, disposal or transportation of any plant; or

(d) in the use, handling, treatment, removal, processing, storing, transport or disposal of any substance; or

(e) in the design, manufacture, importing or supplying of any plant; or

(f) in the design, manufacture, importing or supplying of any substance; or

(g) in the design or construction of any building or structure, including a temporary structure.

1A. The imposition of duties on persons in relation to —

(a) the identification of hazards at the workplace; and

(b) the assessment or risks resulting from such hazards; and

(c) the taking of remedial or other action.

…

4. The registration or licensing of —

(a) any work, plant, process, substance or workplace;

(b) any person carrying out any kind of work,

by the Commissioner or any other prescribed person or authority.

4A. Duties to be observed by —

(a) the owner; or

(b) a person having the control,

of plant used at a workplace.

5. The issuing of certificates of competency or provisional certificates of competency for persons engaged in prescribed work and for the duration, variation, suspension or cancellation of such certificates.

…

12. The appointment of persons who are to be responsible for the supervision of occupational safety and health in prescribed circumstances or industries.

…

17. The medical examination of employees subject to their consent.

…

23. The giving of notices, in specified circumstances, to the Minister, an inspector or other prescribed person or authority.

…

24A. The reporting of injuries incurred at workplaces, or diseases affecting employees at workplaces, other than injuries and diseases prescribed for the purposes of section 23I.

…

60 In the main, it seems reasonably clear that these matters are not part of the general duties set out in the *OSH Act*, but are distinct, *further* duties such as matters of management, administration and record keeping. The duties referred to in item 1A are distinct from the safety standards and procedures referred to in item 1, which presupposes the existence of a duty concerning safety and health in relation to, amongst other things, "the design or construction of any building or structure, including a temporary structure" (item 1(g)). It is also apparent that reg 3.140 relates to the matters at Schedule 1, item 1A.

61 Further, the text of s 23 does not obviously align with the obligations dealt with in reg 3.140. There are a number of areas of incongruity. The first area relates to who owes the duty? Section 23 imposes duties on designers, manufacturers, importers and suppliers of plant for use at workplaces. Section 23(3a) applies to "a person that designs or constructs" any building or structure including a temporary structure for use at workplace. Regulation 3.140 is confined to designers.

62 The second area relates to when the duty applies. Section 23 creates duties, amongst other things, in the design and construction of plant for use at a workplace. As to the provision of information about the plant, it requires the information specified in s 23(1)(c) be provided "when the plant is supplied and thereafter whenever requested". Regulation 3.140 concerns the provision of information by way of a written report, but contemplates that information being provided before the plant is supplied and prior to or during construction.

63 The third area relates to the activities the duty applies to. Section 23 covers a broad range of activities where plant is designed, manufactured, imported or supplied for use at a workplace. Regulation 3.138 confines the application of reg 3.140 to "construction work taking place, or to take place, at a construction site".

64 Finally, there is incongruity in the nature of the obligations. Section 23(3a) imposes a duty on a designer of a building or structure to ensure the design of the building or structure is such that:

(a) persons who properly construct, maintain, repair or service the building or structure; and

(b) persons who properly use the building or structure,

are not, in doing so, exposed to hazards.

65 This provision deals with the act of designing the building or structure rather than the information to be given or communicated. It is a positive duty to do something to eliminate exposure to hazards.

66 Regulation 3.140 on the other hand, does not oblige the designer to do anything to remove or eliminate exposure to identified hazards. It expressly allows the designer to state in its report that it has not done anything to address an identified hazard. The statutory provisions deal with different subject matter. Regulation 3.140 deals with the obligation to provide a report to a client and what the report must contain.

67 The structure of, and headings used in, the regulations indicate a distinction between those regulations that concern the standards and procedures by which the general duty is to be discharged, the management of risks and other administrative matters. That reg 3.140 is intended to impose duties concerning management of risks is apparent because reg 3.140 falls under Part 3 which is headed "Workplace safety requirements". Within Part 3, Division 1 is headed "General Duties Applying to Workplaces". It is reasonable to view the regulations in that division as referable to the primary duty or duty of care. At the other end, Division 11 deals with construction industry induction training. The final division, Division 12, is headed "Construction industry consultation on hazards and safety management". It is here that reg 3.140 resides.

68 Furthermore, reg 3.140 is itself headed "Designer of work for commercial client to give client report" and appears in the same Division as reg 3.143, which deals with "Safe work method statements for high-risk construction work".

69 To limit the words "arising from the design of the end product" in reg 3.140(2)(a)(ii), in the manner contended by the appellant, by reference to the duty of care on designers, is to import concepts that extend well beyond the plain and ordinary meaning of those words. What the appellant attempted by the construction it contended for, is to squeeze reasonable practicability considerations into the words "arising from the design". Part of the reason that the concept of reasonable practicability does not fit into reg 3.140, is because other parts of the regulation delineate its scope, in terms that depart from the way the content of a duty of care is generally articulated. The written report need only specify hazards that "the designer has identified as part of the design process": reg 3.140 (2)(a)(i) and to which "a person at the construction site is likely to be exposed": reg 3.140(2)(a)(ii). Between these limits, and the words "arising from the design" there is no gap into which "reasonably practicable" or other additional limitations, need to be inserted, as a matter of construction.

70 As the appellant recognises in its written submissions, the words "arising out of" or "arising from", have been judicially considered on many occasions. They have been held to be words of wide import, connoting a connection between two things that is wider than the connection required by the words "caused by": ***Dickinson v Motor Vehicle Insurance Trust*** [1987] HCA 49 at 505. The words "arising out of" therefore, require some causality between the design and the hazard. But that does not take the matter as far as the appellant put it, in also requiring that the existence of the causal or consequential relationship is to be judged, having regard to concepts of what is practicable.

71 Regulation 3.140 should not be approached as being coextensive with the duties in s 23. The regulations in Division 12 Part 3 are, as the respondent submitted, intended to be distinct and additional to the duties created by Division 2 of the *OSH Act*. Therefore, reg 3.140 is not to be construed so that the hazard of hollowcore planks falling when being lifted cannot be a hazard arising out the design of the ship building facility. Regulation 3.140, as a matter of construction, is not to be read down in view of the general duties contained in s 23 of the *OSH Act*.

72 It follows from this conclusion that the question for the Tribunal was really only a factual assessment of whether the risk of hollowcore panels falling was a hazard that arose out of the design of the relevant building or structure, and therefore met the requirement of reg 3.140(2)(a)(ii).

73 The respondent contended that the hazard should have been referred to in the report because it was obvious and significant. Regulation 3.140 does not condition the obligation on the hazards meeting any such threshold or degree of seriousness. As summarised above, a hazard must be set out in the report if it is:

(a) identified by the designer as part of the design process;

(b) arises from the design of the end product of the construction work; and

(c) is a hazard to which a person at the construction site is likely to be exposed.

74 It was common ground at the hearing at first instance, that the risk of a hollowcore plank falling was a hazard. Furthermore, the appellant ran its case at first instance on the basis that it was a hazard that had been identified by the appellant as part of the design process because, the appellant argued, it was referred to in or covered by one of Items 9, 17 or 20 of its Safety in Design Risk Management Register or, alternatively, that it was referred to in the Notes to the Design drawings.

75 It was not argued at first instance or on this appeal, that persons at the construction site were not exposed to the hazard of hollowcore planks falling. Therefore, there was no controversy that the condition in reg 3.140(2)(a)(iii) was met. Although submissions were made on the appeal with emphasis on the implicit recognition in s 23(3a), that the designer may assume that the construction will be carried out properly by those who are responsible for the construction, this does not negate the fact that the hazard is one to which a person at the construction site was likely to be exposed.

76 We do not understand the respondent's concession that the appellant did not expose anyone to a hazard to be the same as saying that the hazard was not one to which persons at the construction site were likely to be exposed. Rather, we understand the respondent's submission as meaning that the appellant did not cause the hazard to materialise and was not the immediate and direct cause of the existence of the hazard. This is not the same as a concession that the hazard does not arise out the design of the building. The hazard came into existence in the design's implementation and therefore arose from the design.

77 The Tribunal's factual finding that the hazard arose out of the design was one that was reasonably open to the Tribunal. Mr Airey's evidence as contained in his report of 13 February 2020, is referred to earlier in these reasons. In his report he stated:

> Incorporation of precast hollowcore planks into the building design created a need to transport and deliver the planks to the site and place them in the final position required within the structure being built. Because of this there is a need to ensure that during the transport and erection process the precast prestressed planks are appropriately handled to avoid inappropriate stress levels within the plank and to ensure industrial safety. There is therefore a hazard implicit in the process due to need to lift very heavy items into position. While this is a construction issue it does need consideration in the development of a pre-casting methodology and is specified as being required. This aspect of safety in design clearly resided with the supplier of the precast items and not with GHD.

78 Mr Airey concluded that the risks in construction aspects "of safety in design clearly resided with the supplier of the precast items and not with GHD". However, that conclusion is inconsistent with his identification of the fact that incorporating the hollowcore planks into the design created the need for the construction and therefore the "implicit" process hazards. As also noted above in discussing Mr Airey's evidence, he went on to state:

> I now refer to the CIVMEC Facility Expansion Project Construction Risk Assessment Table and note that Item 9 - Suspended Loads for the Ship Assembly Hall identifies construction and crane operations for installation of larger modules as a hazard and in Item 17 - Suspended Loads, there is no specific reference to lifting of precast concrete panels identified as a hazard. This omission is surprising as the precast panels are heavy and require very specific management to ensure safe placement.

79 The *Code of Practice for Safe Design of Buildings and Structures 2008* envisages that designers should identify the hazards associated with handling heavy and precast elements incorporated in the design of a building. It suggests such risks are considered to arise from the design. The *Code* states:

> Safe design involves consideration of processes, including human factors, organisational issues and life cycle management, not just product.
>
> …
>
> The safe design approach begins in the design and planning phase with an emphasis on making choices about the design, methods of construction and materials used, based on occupational safety and health considerations.
>
> …
>
> Designers may not have management and control over the actual construction of a project but particular attention should be paid to:
>
> - providing guidance on how it might be constructed safely
> - minimising hazards in the design
> - applying safe design principles to more traditional designs and processes and considering whether new or innovative approaches to design will eliminate or reduce risk and result in an intrinsically safer building or structure
> - providing information of any identified hazards arising from an unconventional design to those who will construct or use the building,
>
> and carrying out the above in association with those who have expertise in construction safety.
>
> …
>
> With tilt-up and precast construction, reference should be made to the Commission's Code of Practice Tilt-up and Precast Construction, which sets out design considerations, as well as specific obligations for different parties.
>
> …
>
> Points for designers to consider when providing information include…providing information on significant hazards including…heavy or awkward prefabricated elements likely to create handling risks. Communication of this information between all stakeholders will minimise the likelihood of safety features deliberately incorporated into the design being eliminated at later stages of the life cycle by those engaged in subsequent work on or around the building or structure.

80 Finally, the appellant's Safety in Design Risk Management Register, that it relied upon as its written report for the purpose of reg 3.140, did identify and refer to hazards of a similar nature to the hazard associated with hollowcore planks falling from heights. For instance, as noted earlier in these reasons, in Item 9, it refers to "Suspended Loads - construction crane operations for installation of larger modules", Item 17 "Suspended loads - cranes on different levels crossing over and Item 20 "Suspended loads - Cranes working near glazing, crane loads falling or swinging through glazing". The inclusion of these items shows that the appellant considered such hazards to arise from the design of the Project, despite the fact that they arose directly from construction processes and methods.

81 For these reasons, this ground is not made out.

Ground 2

82 This ground of appeal is to the effect that the Improvement Notice was invalid when it was issued on the basis that it was uncertain, vague and ambiguous. It was submitted by the appellant that the principles discussed and applied by the Full Bench of the Commission in ***Alcoa of Australia Limited v Andrew Chaplyn*** [2019] WAIRC 00011; (2019) 99 WAIG 93, concerning prohibition notices issued under the *Mines Safety and Inspection Act 1994* (WA), have equal application to the present matter. The appellant submitted this was recognised by the Tribunal when at [73] to [78] of its reasons, the Tribunal referred to ***Alcoa*** and agreed that in the context of s 48 of the *OSH Act*, an improvement notice "must be certain in its terms as a condition of its valid exercise". (See AB165-166).

83 Given the conclusions of the Tribunal, the appellant submitted that it was recognised by the Tribunal that to be effective, the Improvement Notice needed to be modified. Thus, as the submission went, unless it was modified, the notice could not be affirmed and it was invalid. Furthermore, the appellant challenged what was described by the Tribunal as a "retrospective activity", in modifying the notice in circumstances where the Project had long since been completed. Thus, what in effect the Tribunal did was to rectify a defective improvement notice in circumstances where the relevant hazard no longer existed at the Project. Properly construed, reg 3.140 did not support this course and it was not a lawful exercise of the Tribunal's powers to do so.

84 On the other hand, the respondent contended that read as a whole, the Improvement Notice was not invalid when it issued, especially having regard to s 26 of the *Industrial Relations Act 1979* (WA), which is adopted in the *OSH Act* and applies to the Tribunal's exercise of jurisdiction and powers. Further, even though the appellant's work at the Project had been completed, the respondent contended it was possible to still comply with the Improvement Notice, in terms of inserting the required entries

into the written report to its client. Whilst directions are not mandatory to include in a notice, under s 50 of the *OSH Act*, taken in the context of the Improvement Notice as a whole, they were not ambiguous and did not render the notice invalid. Even if they could be so described, as the submission went, directions may be severed from the notice, leaving it intact and valid.

85 As discussed in ***Alcoa,*** a prohibition notice issued under the *MSI Act,* must be sufficiently clear and unambiguous to enable the recipient of the notice to know what it is they must do, to comply with it. A failure to comply with a prohibition notice under the *MSI Act* is a criminal offence: s 31AG.

86 As to the issuance of statutory notices in a different context, under the *Environmental Protection Act 1986* (WA), in ***Re Lawrence; ex parte Goldbar Holdings Pty Ltd*** (1994) 11 WAR 549 a pollution abatement notice issued under s 65(2)(b) of the *EP Act* came under challenge on several bases, including that it was uncertain and therefore invalid. Malcom CJ in considering this argument at 566-567 said:

> As I have already indicated, the provision that the relevant measures must be "specified" is that such measures must be unambiguously identified and made clear in the notice itself. I note that this was also the approach taken by Gobbo J in *Environment Protection: Authority v Simsmetal Ltd* (at 617; 316). That case was concerned with s 62A of the *Environment Protection Act* 1970 (Vic) which relevantly provides that the authority made by notice in writing direct a relevant .person "to take the clean-up measures as specified in the notice". Gobbo J said (at 629; 318):
>
> > "The Act goes beyond requiring merely a notice that identifies the pollution and calls on the recipient to remedy it. It obliges the Authority to specify the measures."
>
> Gobbo J referred with approval and applied the decision in *Perry v Garner* [1953] 1 QB 335 in which the· occupier was served with a notice requiring him to take certain steps for the destruction of rats on his land. The notice required poison treatment "or other work of a not less ·effectual character". The Act under which the notice was served spoke of a notice requiring such reasonable steps for the purpose "as may be so specified". Lord Goddard CJ (with whom Croom-Johnson and Pearson JJ agreed) said:
>
> > "In the opinion of this Court, that is not specifying the steps which are to be taken. The notice specifies a step which the defendant may take, namely, poison treatment, but it tells him that he may take other steps which are not specified. The notice at once becomes unspecific because it directs the doing of a particular thing or something else, and the something else is left completely at large. I do not think, therefore, that it can be said that this notice complies with the section. If it had confined itself to poison treatment, there would have been a compliance, but as it does not, in my opinion this is not a good notice under the Act."
>
> It is clear that the notice must unambiguously identify and make clear the measure to be taken. It was submitted that measure l(a) in so far as it provided that any area intended to carry a vehicle must be "treated with an effective dust suppressant media" to prevent or minimise the generation of dust, failed to specify a precise and unambiguous measure. There was a note, however, that for the purposes of the measure "effective dust suppressant media" meant the proprietary product Protect Coat K6l or any similar material. Thus what was specified were alternatives, namely, paving, sealing, or otherwise treating the area with an effective dust suppressant media. In my opinion, the specification of three possible measures, one of which required treatment with a proprietary product or any similar material, was sufficiently clear standing on its own. However, when read with measure l(b) the matter was left open-ended by the delegation to an inspector to form an opinion whether insufficient areas, had been sealed or otherwise treated. In my opinion, measure l(b) was a significant and important portion of the notice and the notice would have a different character if measure l(b) were simply severed. In .this respect I agree with the approach adopted by Gobbo J to the question of severance as set out (at 630-631; 319-320) in *Environment Protection Authority v Simsmetal Ltd.* In particular, Gobbo J said (at 631; 320) that:
>
> > "It is in any event arguable that a court should be reluctant to grant severance in respect of the contents of a notice than in respect of a statute or a regulation. In the case of the latter, amendment is more difficult and invariably a matter of delay. In a case of a notice, the remedy is much simpler in that the Authority can deliver a fresh notice."

87 In ***Bio-Organics Pty Ltd v The Chief Executive Officer, Department of Water and Environmental Regulation*** [2018] WASC 263, Allanson J considered a case also under the *EP Act*. This matter concerned the issuance of a closure notice under s 68A of the *EP Act*. An application for a declaration was made on the grounds that the closure notice was invalid, due to uncertainty of expression and that it did not specify things required to be done, with sufficient clarity and certainty of expression.

88 As noted by the respondent in its written submissions, Allanson J held at [26] that, in applying ***Television Corporation Ltd v Commonwealth*** [1963] HCA 30; (1963) 109 CLR 59 (citing ***King Gee Clothing Co Pty Ltd v The Commonwealth and Canns Pty Ltd v The Commonwealth*** [1946] HCA 5; (1946) 71 CLR 210) "there is no general principle that uncertainty in an executive instrument spells legal invalidity. But there may be a requirement of certainty in the provisions which create the power to impose conditions". It is the latter part of this statement by his Honour that is of particular importance in the present context. Section 48 of the *OSH Act*, set out above, enables an Inspector to issue an improvement notice in two circumstances. The first, is when an Inspector is of the opinion that a person is *contravening* a provision of the *OSH Act*. The second circumstance is where the Inspector forms the opinion that a person *has contravened* a provision of the *OSH Act*, where it is *likely* the contravention *will continue or be repeated* (our emphasis). If the Inspector forms either opinion above, and issues an improvement notice, the Inspector must then, in the improvement notice, require the person to "remedy the contravention…": s 48(1). By s 48(2), the Inspector is then required ("shall") to include in the improvement notice, the matters specified.

89 It was common ground in this matter, and as found by the Tribunal at first instance, that the Inspector did not comply with s 48(2)(c) of the *OSH Act* in that he did not "specify the provision of this Act in respect of which that opinion is held". This refers to the relevant opinion in either s 48(1)(a) or (b). The Tribunal held that it could have been either (at [84] reasons AB167). The Tribunal also held that the Improvement Notice was uncertain as to the time for compliance, being "19 Mar 2019 at 0000 hours". Despite these omissions and lack of clarity, the Tribunal held that section 1 of the Improvement

Notice was compliant "in part". As to section 2, dealing with the directions inserted by the Inspector under s 50 of the *OSH Act*, the Tribunal held that the directions were not sufficiently clear and unambiguous. It was on this basis, and in reliance on the power to modify the decision of the Commissioner under s 51A(5)(b) of the *OSH Act,* that the Tribunal issued the order that it did.

90 In our opinion, for the following reasons, with respect, the Tribunal was in error in exercising its power to affirm and modify the decision of the Commissioner in this case, in the way it did so. The discretion of the Tribunal, in modifying the Improvement Notice, miscarried to the extent that warrants appellate intervention.

91 Whether directions are included in an improvement notice under s 50 of the *OSH Act*, is a discretionary decision. But in this case, having decided to do so, the Inspector, in including directions in the Improvement Notice, must ensure that they are clear and unambiguous. They were not. The Tribunal found as much at [80] of its reasons. All three of the directions in section 2 of the Improvement Notice did not clearly indicate to the appellant what specifically it was required to do to comply. Paragraph 1 refers to "Ensure as the designer all aspects of Reg 3.140 are raised with your client in a written report". This does no more than refer to reg 3.140 in terms. Similarly, is the direction to "refer to Section 23(3a) of the OSH Act 1984". Likewise, the direction to "refer to the Code of Practice Safe Design of buildings and Structures 2008" is very broad and is entirely unclear as to what parts of a document running to some 24 pages, the appellant was required to refer to in order to comply with the Improvement Notice (see AB542).

92 As noted above, the appellant and the respondent were at odds as to what the consequences were of the Tribunal's conclusions as to the ambiguity and uncertainty in section 2 of the Improvement Notice. The appellant contended that the Tribunal recognised, in its conclusions at [73] to [74], that certainty of the Improvement Notice was a condition of the valid exercise of the power to issue it. The appellant contended also, that the Tribunal properly applied the decision of the Full Bench in ***Alcoa***, to the circumstances of the issuance of an improvement notice under the *OSH Act*. On the other hand, the respondent contended that read as a whole, the Improvement Notice was not invalid.

93 The appellant's further contention was that the Tribunal implicitly, if not explicitly, acknowledged that the requirement of certainty was not met in this case. As such, the Improvement Notice as issued, was invalid and required modification under s 51A(5)(b) of the *OSH Act*. We consider that the requirements discussed in the cases cited above, and as applied in ***Alcoa***, equally apply to the issuance of an improvement notice under the *OSH Act* as to the issuance of a prohibition notice under the *MSI Act*. The purpose and objects of both the *MSI Act* and the *OSH Act*, are very similar. Both have the object of promoting the safety and health of persons at work. Both improvement and prohibition notices under the *OSH Act* carry criminal penalties for non-compliance: ss 48(4), (5) and (6); 49(5) and (6) *OSH Act*. It would be incongruous with the statutory scheme if, in circumstances where a recipient of a notice is liable to a criminal penalty for non-compliance, there was no requirement for them to be clearly and unambiguously told what it is they must do to comply with the notice.

94 Thus, in the issuance of an improvement notice or a prohibition notice under the *OSH Act,* certainty of terms is a condition of the valid exercise of the power to issue such a notice.

95 The next issue which arises is the statutory and/or discretionary foundation for the decision of the Tribunal to modify the Improvement Notice as it did. The decision of the Tribunal in this respect is set out at [82] to [84]. The factual circumstances relevant to the Project were set out at [82] of the Tribunal's reasons. The evidence before the Tribunal, which was uncontroversial, was that the flooring in the building, and thus the need to lift the hollowcore concrete panels into place from a height, was complete by mid-2019, some 12 months prior to the hearing before the Tribunal. Whilst the respondent suggested in submissions that there was some doubt as to whether the Project was completed by the time of the hearing, there was uncontroverted evidence given by Mr Tonkin that the construction of the Ship Assembly Hall was complete and the contractor was moving into the building and commencing fit out work. His evidence also was that the appellant's work on the project was completed (see p 19 transcript at first instance).

96 The Tribunal recognised that the effect of modifying the Improvement Notice in the manner that it did also had the effect of "retrospectively" imposing an obligation on the appellant. Additionally, at [84], the Tribunal founded its decision to modify the Improvement Notice, to remove the directions in section 2, and to add a direction to include the hazard of hollowcore panels falling when being lifted by a crane in the written report provided to clients pursuant to regulation 3.140 of the *Regulations* to 14 June 2021, because either of ss 48(1)(a) or 48(1)(b) could have applied, but the notice contained neither.

97 This conclusion required a factual and/or legislative foundation, to support the power to affirm the Improvement Notice with modifications.

98 It is trite that for the purposes of ss 48(1)(a) and (1)(b) of the *OSH Act*, by the application of s 46 of the *Interpretation Act 1984* (WA), "Act" includes subsidiary legislation, such as the *Regulations*. Accordingly, to provide the foundation for the conclusion that the Improvement Notice should be modified in the manner that it was, the Tribunal had to be satisfied of the existence of an ongoing hazard, and the appellant's obligation to comply with the relevant statutory provisions, as a duty under the *Regulations*.

99 We have set out the terms of the relevant regulations earlier in these reasons. Regulation 3.138 provides that the terms of Division 12 apply to construction work "taking place or to take place, at a construction site". As noted earlier, it was not controversial that the appellant was a "designer" as defined in reg 3.137. Also, it was not in dispute that CIVMEC was the "client" as defined in reg 3.137. In terms of the application of Division 12, CIVMEC was so described, as the person for whose direct benefit all of the work done at "the" construction site existed, upon "its" completion. It seems tolerably clear that in the context of the present case, this meant all work done for CIVMEC at the Project.

100 Having due regard to the scope of Division 12, that it applies to extant or future work at a construction site, one then has to examine the key provision in this case, reg 3.140. By reg 3.140(1) reference is again made to extant or future work at " 'the' construction site…". We note also that reference is made in sub-reg (1) to work at the construction site that "was … being

done…". However, given the inconsistency of this with reg 3.138(1) and having regard to the terms of sub-reg (2) as a whole, on the facts of the present case, little turns on that for present purposes.

101 It is then contemplated that, in relation to that client at that construction site, the designer is required to do certain things. The obligations on a designer in reg 3.140(2)(a) to (d) are conjunctive. A written report must be given to the client. This written report must include the hazards the designer has identified as part of the design process in subpar (i), that arise from the design of the "end product of the construction work". Importantly for present purposes, in (iii), there must be the identification of hazards "to which a person at 'the construction site' 'is' likely to be exposed".

102 Division 12 is to be construed as a whole and consistent with its text, having due regard to the general purpose or policy of the provisions: ***Programmed Industrial Maintenance*** per Kenneth Martin J at [59] to [63].

103 Viewed in the context of Division 12 of the *Regulations* when read as a whole, reg 3.140 requires a temporal connection between the design hazard(s) identified by the designer and the risk of exposure to the hazard by a person(s) at "the construction site". We are also of the view, consistent with this temporal connection, that reference in reg 3.140 to "the construction site" in sub-regs (1) and (2)(a)(iii), is reference to the relevant construction work being done or to be done. This is consistent with reg 3.138(1), dealing with the scope of application of Division 12. There must be a construction site in existence or in contemplation, to which the relevant duties will attach.

104 This interpretation is reinforced by the words "the end product of the construction work", being the completed building or project. Construed in this way, the relevant "construction site", under the *Regulations*, was the CIVMEC Henderson site, the location of the Project. This is also consistent with the language of reg 3.140(2)(iii), which refers to the "likely exposure of a person" at the construction site, to hazards required to be identified by the designer. If there is no longer a relevant construction site, involving obligations imposed on a designer, it is difficult to see how any person can be likely exposed to hazards, the subject of the obligations contained in reg 3.140(2).

105 In adopting this approach to the construction of Division 12, for the purposes of ss 48(1)(a) and 48(1)(b) of the *OSH Act*, on the facts of this case, it was not open for the Tribunal to conclude that a contravention of reg 3.140 was occurring or had occurred, in circumstances where it was likely to continue. This was because the Project, as far as the appellant was concerned, was complete. The floor was complete, there was to be no further lifting of concrete hollowcore panels from a height. No person at the Project "construction site" in Henderson, as that phrase should be construed in reg 3.140, would likely be exposed to the hazard of hollowcore concrete planks falling from height. Therefore, the statutory criteria, as specified in reg 3.140, warranting the exercise of the power to modify the Improvement Notice, were not satisfied on the facts of this case. It is not sufficient to speculate that a business such as the appellant, may at some future point, engage in another design project at an indeterminate time, to justify imposing the obligations imposed by reg 3.140 of the *Regulations.*

106 In these circumstances, the exercise of the discretion by the Tribunal to retrospectively affirm and modify the Improvement Notice miscarried, as the Improvement Notice could no longer have any practical effect.

107 Accordingly, we would uphold this ground of appeal.

Notice of contention

108 The respondent filed a notice of contention in which it maintained that the Tribunal's decision should be upheld on grounds other than those relied on in the Tribunal's reasons for decision. As to the contentions raised relating to ground 1 of the appeal, as this appeal ground has not been made out, it is unnecessary to consider the contentions raised by the respondent concerning these issues.

109 As to ground 2 of the grounds of appeal, as we understood the contention, the respondent calls in aid s 26 of the *IR Act*, to the effect that the Tribunal, in applying this provision, can avoid technicality and legal form, and consider the interests of the persons immediately concerned. The tenor of the respondent's submission seemed to be that read as a whole, in the context of s 26, the Improvement Notice was sufficiently clear as to how the appellant was required to comply with it.

110 Whilst s 26 of the *IR Act* is incorporated into the *OSH Act*, provisions such as s 26 do not relieve the Tribunal of the obligation to observe relevant principles of the general law. In considering a provision like s 26(1)(a), contained in s 108(1)(b) of the *Anti-Discrimination Act 1977* (NSW), providing that the relevant tribunal "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms", Gleeson CJ and Handley JA in ***Qantas Airways Ltd v Gubbins and Others*** (1992) 28 NSWLR 26, said at [30]:

> The words "equity, good conscience and the substantial merits of the case" are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found: see generally, *Santos Ltd v Saunders* (1988) 49 SASR 556 at 564 per Legoe J. In some circumstances the presence of this language may indicate that the decision-maker is free from any obligation to apply rules of law so that any decision will be executive rather than judicial and not subject to appeal even if that is otherwise available: see *Moses v Parker; ex parte Moses* [1896] AC 245 …
>
> In our view the duty to act according to equity and good conscience, in the context of this Act, did not free the Tribunal from its duty to apply the general law in deciding the issues raised by the defences of release by deed".

111 In the context of the *OSH Act,* the Commission, sitting as the Tribunal is exercising quasi-judicial and not executive power. The above principles apply to the exercise of the Tribunal's jurisdiction. ***Qantas Airways Ltd*** has been consistently applied by the Full Bench of this Commission in the same way (see for example ***Health Services Union of Western Australia, (Union of Workers) v Director General of Health*** [2008] WAIRC 00215; (2008) 88 WAIG 543 per Ritter AP at [160]-[175]; ***Australian Medical Association (WA) Incorporated v The Minister for Health*** [2016] WAIRC 00699; (2016) 96 WAIG 1255 per Smith AP at [156]).

112 In the present context, given that non-compliance with the Improvement Notice would constitute a criminal offence, we do not consider that s 26(1) of the *IR Act* could provide a basis for the Tribunal to overlook or disregard the fact that an improvement notice may be invalid because of ambiguity or uncertainty. In our view, the Tribunal correctly concluded that certainty of the terms of an improvement notice, is a condition attaching to the exercise of the power under s 48 of the *OSH Act* to issue such a notice, in reliance on the principles discussed and applied by the Full Bench in ***Alcoa***.

113 The respondent made submissions to the effect that the time for compliance as specified in the Improvement Notice was not crucial for its validity. The respondent seemed to contend that despite the Tribunal concluding that the appellant's submissions to the effect that the time for compliance was ambiguous were made out (at [81] see AB167), on a reading of the Improvement Notice, the time for compliance was clear enough. Furthermore, the respondent contended that the actions of the appellant in seeking a review of the Improvement Notice to the WorkSafe Commissioner, when it did, meant that the appellant understood that the time specified was by midnight on 19 March 2019. Furthermore, even if uncertainty as to time for compliance did exist, the respondent contended that it was insufficient to render the Improvement Notice invalid, having regard to the terms of the notice as a whole.

114 The difficulty with this contention is that it is contrary to the finding of the Tribunal that the time for compliance in the Improvement Notice was ambiguous. The respondent has bought no cross appeal against this finding. This conclusion was plainly open to the Tribunal as in our view, specifying a time for compliance of "by no later than 19 March 2019 at 0000 hours", was unclear and ambiguous. The Tribunal was correct to so conclude. As the appellant contended in response however, this issue was only one basis on which it contended that the Improvement Notice was invalid on the grounds of uncertainty.

115 The issuance of directions by an Inspector under s 50 of the *OSH Act* has been discussed above, in relation to ground 2. No doubt, as the respondent contended, the power under s 50 for an Inspector to include directions in an improvement notice is discretionary. Such directions are not required as a condition of the exercise of the power to issue an improvement notice under s 48 of the *OSH Act*. However, once an Inspector decides to exercise this discretion, then such directions are subject to the same requirement of clarity and certainty as is the rest of the notice. If an improvement notice contained measures that the recipient is required to take to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates, then it is axiomatic in our opinion, that the recipient is entitled to know with certainty what it is they are required to do to comply: ***Re Laurence*** per Malcolm CJ at 567. Whilst the inclusion of directions may be discretionary, compliance with them is not. Directions, equally constitute, along with the rest of the content of an improvement notice, enforceable obligations, and a failure to comply with them is a failure to comply with the notice, leading to criminal liability.

116 As noted by the appellant too, severance of the original direction in this case would not resolve the issue. The Tribunal found it necessary to modify the Improvement Notice, to include the direction that it did, to make it clear and unambiguous and to enable the appellant to know what it was required to do.

117 The final matter raised by the respondent went to the issue of practical compliance with the Improvement Notice. The underpinning of the respondent's contentions in this regard, involves the construction of the relevant regulations, which is the subject of discussion in relation to ground 2 above. The decision of the Tribunal cannot be supported based on the contentions advanced by the respondent.

Conclusion

118 For the foregoing reasons, we will make orders that the appeal be upheld, and the decision of the Tribunal be varied by revoking the decision of the WorkSafe Western Australia Commissioner. An order cancelling Improvement Notice 45300297 will also be made.

2022 WAIRC 00002

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	TUESDAY, 4 JANUARY 2022
FILE NO/S	FBA 3 OF 2021
CITATION NO.	2022 WAIRC 00002

Result	Appeal upheld
Appearances	
Appellant	Mr P Yovich SC of counsel and with him Mr S Puxty of counsel
Respondent	Ms T Hollaway of counsel

Order

This appeal having come on for hearing before the Full Bench on 21 September 2021, and having heard Mr P Yovich SC of counsel and with him Mr S Puxty of counsel on behalf of the appellant, and Ms T Hollaway of counsel on behalf of the respondent, and reasons for decision having been delivered on 22 December 2021, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

(1) THAT the appeal be and is hereby upheld.

(2) THAT the decision of the Tribunal delivered on 14 May 2021 in application OSHT 5 of 2019 is varied by revoking the decision of the WorkSafe Western Australia Commissioner.

(3) THAT Improvement Notice 45300297 is cancelled.

By the Full Bench

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

COMMISSION IN COURT SESSION—Unions—Application for Alteration of Rules—

2022 WAIRC 00028

APPLICATION PURSUANT TO S.62(2) - ALTERATION OF REGISTERED RULES RULE - 1 NAME; RULE 2 - DEFINITIONS AND INTERPRETATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2022 WAIRC 00028
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 25 JANUARY 2022
DELIVERED	:	THURSDAY, 27 JANUARY 2022
FILE NO.	:	CICS 30 OF 2021
BETWEEN	:	WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

Catchwords	:	Industrial law (WA) – Application to change name – No objections – Relevant parts of the Act complied with – Application granted
Legislation	:	*Industrial Relations Act 1979* (WA) s 62, s 62(2)
Result	:	*Order issued*
Representation:		
Applicant	:	Mr A Johnson

Reasons for Decision

1 The applicant seeks the authority of the Commission in Court Session under s 62(2) of the *Industrial Relations Act 1979* for the Registrar to register an alteration to its registered name. The applicant seeks to change its registered name from the 'Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth' to the 'Local Government, Racing and Cemeteries Employees Union (WA)'. The applicant seeks this alteration to its name in large part because its counterpart federal body is also seeking to change its name, in very similar terms.

2 The Registrar can only register such an alteration to the rules of the applicant if the Commission in Court Session provides the authority to do so. The affected rules are Rule 1 – Name of Union and Rule 2 – Definitions and Interpretation, which defines the applicant by reference to its registered name in Rule 1. Having considered the materials filed in support of the application, including a statutory declaration by the General Secretary of the applicant, Mr Johnson, along with its annexures, and there being no objections lodged by any person or organisation, or by any member of the applicant, we are satisfied that the provisions applicable under s 62 of the *Act* have been complied with. Accordingly, the Registrar will be authorised to register the alteration to these rules.

2022 WAIRC 00039

APPLICATION PURSUANT TO S.62(2) - ALTERATION OF REGISTERED RULES RULE 1 - NAME; RULE 2 - DEFINITIONS AND INTERPRETATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 1 FEBRUARY 2022
FILE NO/S	CICS 30 OF 2021
CITATION NO.	2022 WAIRC 00039

Result	Order issued
Representation	
Applicant	Mr A Johnson

Order

HAVING heard Mr A Johnson on behalf of the applicant, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders

THAT the Registrar is hereby authorised to register the alterations to the Rules of the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth as follows:

(a) In Rule 1 – NAME OF UNION alter the name "Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth" to "Local Government, Racing and Cemeteries Employees Union (WA)"; and

(b) In Rule 2 – DEFINITIONS AND INTERPRETATION alter the definition of "Union" by deleting the words "Western Australian Road Boards, Parks, and Racecourse Employees; Union of Workers, Perth, and also includes the short title Municipal Employees' Union or the initials M.E.U. or any of its associated bodies." and insert in lieu thereof the words "shall mean the Local Government, Racing and Cemeteries Employees Union (WA)".

(Sgd.) S J KENNER,
Chief Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2022 WAIRC 00044

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	WORMALD SECURITY CONTROLS AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 4 FEBRUARY 2022
FILE NO/S	APPL 51 OF 2021
CITATION NO.	2022 WAIRC 00044

Result	Award varied
Representation	
Applicant	Ms B Ward
Respondents	No appearance

Order

WHEREAS this is an application filed by the Electrical Trades Union WA on 19 November 2021 to vary the *Electrical Trades (Security Alarms Industry) Award, 1980* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (IR Act);

AND WHEREAS Schedule B of the application set out the grounds upon which it is made, indicating the application is made to update the allowances contained in the Award by the respective percentage increases determined by the State Wage Case decisions 2016 to 2021 and CPI;

AND WHEREAS clauses 11, 15 and 28 allowances were last varied on 5 November 2015 ([2015] WAIRC 01001; (2015) 95 WAIG 1829);

AND WHEREAS clauses 16 and 18 allowances were last varied on 9 December 2014 ([2014] WAIRC 01334; (2014) 94 WAIG 1874) to take into account the 2015 State Wage Case and CPI increases to the March 2014 quarter respectively;

AND WHEREAS the proposed key amendments sought by the present application were set out in an attachment to the application supported by a second attachment showing the calculations underpinning the amendments sought;

AND WHEREAS the only party named in Schedule Two of the Award is the ETU;

AND WHEREAS the Electrical and Communications Association of Western Australia (Union of Employers) advised that it consented to the application on the basis that any orders take effect from the first full pay period on or after 1 January 2022;

AND WHEREAS notice of the application was provided to the employer respondents to the Award, none of whom filed a response. The application is, therefore, unopposed;

AND WHEREAS as the ETU is a party bound by the Award it has standing to bring the application under s 40(2) of the IR Act;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in this application;

AND BEING satisfied that:

(a) The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation;

(b) The application is not made within a term specified in the Award; and

(c) The requirements for varying the Award are met;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the IR Act, hereby orders –

THAT the *Electrical Trades (Security Alarms Industry) Award, 1980* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 1 January 2022.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

1. Clause 11. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $14.50 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $10.00 for each meal so required.

2. Clause 15. - Special Rates and Provisions:

A. Delete subclauses (1), (2), (3) and (4) of this Clause and insert in lieu thereof the following:

(1) Height Money: An employee shall be paid an allowance of $3.35 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) Dirt Money: An employee shall be paid an allowance of 68 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) Confined Space: An employee shall be paid an allowance of 86 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) Hot Work: An employee shall be paid an allowance of 68 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

B. Delete subclause (6) of this Clause and insert in lieu thereof the following:

(6) Percussion Tools:

An employee shall be paid an allowance of 44 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

C. Delete subclauses (13) and (14) of this Clause and insert in lieu thereof the following:

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $14.00 per week in addition to their ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $28.20 per week.

3. Clause 16. - Car Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) A year for the purpose of this Clause shall commence on the 1 July and end on the 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Rate per Kilometres (cents)			
Metropolitan Area	88.4	79.0	68.7
South West Land Division	90.5	80.9	70.3
North of 23.5º South Latitude	99.9	89.2	77.6
Rest of the State	93.0	83.8	72.7
Motor Cycle (In All Areas)	30.3 Cents per Kilometre		

4. Clause 18. - Distant Work: Delete subclauses (4) and (5) of this Clause and insert in lieu thereof the following:

(4) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of $37.00 for any weekend that they return to their home from the job but only if -

(a) The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee is not required for work during that weekend;

(c) The employee returns to the job on the first working day following the weekend; and

(d) The employer does not provide or offer to provide suitable transport.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $16.50 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 28. - Wages: Delete subclauses (3), (4) and (5) of this Clause and insert in lieu thereof the following:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of $19.50 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $62.90 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $57.00 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $33.00 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) Leading Hand: In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$35.80
(b)	If placed in charge of not less than ten and not more than twenty other employees	$54.50
(c)	If placed in charge of more than twenty other employees	$70.30

2022 WAIRC 00058

APPLICATION TO VARY METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	WEDNESDAY, 9 FEBRUARY 2022
FILE NO/S	APPL 7 OF 2020
CITATION NO.	2022 WAIRC 00058

Result Award varied

Representation

Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations

Mr P Moss on behalf of Chamber of Commerce and Industry Western Australia

Dr T Dymond on behalf of UnionsWA

Ms P Lim on behalf of the Australian Manufacturing Workers' Union

Order

HAVING heard from Mr B Entrekin on behalf of the Hon. Minister for Industrial Relations, Mr P Moss on behalf of Chamber of Commerce and Industry WA, Dr T Dymond on behalf of UnionsWA and Ms P Lim on behalf of the Australian Manufacturing Workers' Union, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the *Metal Trades (General Award)* be varied in accordance with the following Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 9 February 2022.

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

SCHEDULE

1. Clause 1.2 – Arrangement:

(A) Delete clause 6.2 and insert in lieu thereof the following:
6.2 Sick / Carer's Leave

(B) Delete clause 6.6 and insert in lieu thereof the following:
6.6 (Deleted)

(C) Delete clause 8.4 and insert in lieu thereof the following:
8.4 (Deleted)

(D) Delete Appendix 3 and insert in lieu thereof the following:
Appendix 3 - ACTU Code of Conduct on Twelve Hour Shift Work

2. Clause 1.6 – Definitions and Classification Structure:

(A) Delete subclause 1.6.1 of this clause and insert in lieu thereof the following:

"Apprentice" means an apprentice under the *Vocational Education and Training Act 1996*, or any successor legislation.

"Casual Employee" means an employee engaged and paid as such.

"Construction work" means work on site in or in connection with:

(1) the construction of a large industrial undertaking or any large civil engineering project;

(2) the construction or erection of any multi-storey building; and

(3) the construction, erection or alteration of any other building; structure, or civil engineering project which the employer and the union or unions concerned agree or, in the event of disagreement, which the Commission declares to be construction work for the purposes of this Award.

"Junior Employee" means an employee under the age of 21 years who is not an apprentice.

"Commission" means the Western Australian Industrial Relations Commission.

"Registrar" means the Registrar of the Western Australian Industrial Relations Commission.

"the Act" means the *Industrial Relations Act 1979*.

(B) Delete subclause 1.6.2(1) of this clause and insert in lieu thereof the following:

(1) The following classifications and definitions have superseded the old task and craft based definitions contained in Appendices 1 and 2 hereof. The following classifications specify skill and training standards and broad areas of work. The definitions recognise the relevant qualifications as recognised and accredited in Western Australia by the Department of Training and Workforce Development or its successor.

(C) Delete subclause 1.6.2(4) of this clause and insert in lieu thereof the following:

(4) Appointment to any wage level in the classification structure is contingent upon such additional work being available and required to be performed by the employer.

Wage Group	Classification Title	Minimum Training Requirement
C 5	Advanced Engineering Tradesperson - Level II	Diploma of Engineering - Advanced Trade, or equivalent.
C 6	Advanced Engineering Tradesperson - Level I	C10 + 80% towards a Diploma of Engineering - Advanced Trade, or equivalent.
C 7	Engineering Tradesperson Special Class - Level II	Certificate IV in Engineering, or C10 + 60% towards a Diploma of Engineering, or equivalent.
C 8	Engineering Tradesperson Special Class - Level I	C10 + 40% towards a Diploma of Engineering, or equivalent.
C 9	Engineering Tradesperson - Level II	C10 + 20% towards a Diploma of Engineering, or equivalent.

Wage Group	Classification Title	Minimum Training Requirement
C 10	Engineering Tradesperson - Level I Engineering / Production Employee	Recognised Trade Certificate, or Certificate III in Engineering - Mechanical Trade, or Certificate III in Engineering - Fabrication Trade, or Certificate III in Engineering - Electrical/Electronic Trade, or equivalent.
C 11	Engineering / Production Employee - Level IV	Engineering Production Certificate II, or Certificate II in Engineering Production Technology, or equivalent.
C 12	Engineering / Production Employee - Level III	Engineering Production Certificate I or Certificate II in Engineering, or equivalent.
C 13	Engineering / Production Employee - Level II	In-house Training
C 14	Engineering / Production Employee - Level I	Up to 38 hours' induction training

(D) Delete subclause 1.6.3(1) of this clause and insert in lieu thereof the following:

(1) Engineering/Production Employee - Level I

(Relativity to C10 - 78%)

An Engineering/Production Employee - Level I is an employee who undertakes up to 38 hours' induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow employees, training and career path opportunities, plant lay-out, work and documentation procedures, occupational health and safety, equal employment opportunity and quality control/assurance.

(E) Delete subclause 1.6.4(1) of this clause and insert in lieu thereof the following:

(1) Engineering/Production Employee - Level II

(Relativity to C10 - 82%)

An Engineering/Production Employee - Level II has completed up to three (3) months structured training so as to enable the employee to perform work within the scope of this level.

(F) Delete subclause 1.6.4(3)(c) and (d) of this clause and insert in lieu thereof the following:

(c) Basic soldering or butt and spot welding skills or cutting scrap with oxy-acetylene blow pipe.

(d) Uses selected hand tools.

(G) Delete subclause 1.6.5(1) of this clause and insert in lieu thereof the following:

(1) Engineering/Production Employee - Level III

(Relativity to C10 - 87.4%)

An Engineering/Production Employee - Level III has completed an Engineering Production Certificate I or Certificate II in Engineering or equivalent training to enable him/her to perform work within the scope of this Level.

(H) Delete subclause 1.6.5(3)(d) of this clause and insert in lieu thereof the following:

(d) Basic tracing and sketching skills.

(I) Delete subclause 1.6.6(1) and (2) of this clause and insert in lieu thereof the following:

(1) Engineering/Production Employee - Level IV

(Relativity to C10 - 92.4%)

An Engineering/Production Employee - Level IV has completed an Engineering Production Certificate II, or Certificate II in Engineering Production Technology, or equivalent as to enable the employee to perform work within the scope of this Level.

(2) At this Level an employee performs work above and beyond the skills of an employee at C12 and to the level of the employee's training:

(a) Works from complex instructions and procedures.

(b) Assists in the provision of on-the-job training to a limited degree.

(c) Co-ordinates work in a team environment or works individually under general supervision.

(d) Is responsible for assuring the quality of his or her own work.

(J) Delete subclause 1.6.9(1) of this clause and insert in lieu thereof the following:

(1) Engineering Tradesperson - Level II

(Relativity to C10 - 105%)

An Engineering Tradesperson - Level II is an:

Engineering Tradesperson (Automotive) - Level II; or

Engineering Tradesperson (Electrical/Electronic) - Level II; or

Engineering Tradesperson (Mechanical) - Level II; or

Engineering Tradesperson (Fabrication) - Level II,

who has completed the minimum training requirements specified in clause 1.6.2(4) or equivalent.

(K) Delete subclause 1.6.10(1) of this clause and insert in lieu thereof the following:

(1) Engineering Tradesperson Special Class - Level I

(Relativity to C10 - 110%)

An Engineering Tradesperson Special Class - Level I means an:

Engineering Tradesperson Special Class (Automotive) - Level I; or

Engineering Tradesperson Special Class (Electrical/Electronic) - Level I; or

Engineering Tradesperson Special Class (Mechanical) - Level I; or

Engineering Tradesperson Special Class (Fabrication) - Level I,

who has completed the minimum training requirements specified in clause 1.6.2(4) or equivalent.

(L) Delete subclause 1.6.11(1) of this clause and insert in lieu thereof the following:

(1) Engineering Tradesperson Special Class - Level II

(Relativity to C10 - 115%)

An Engineering Tradesperson Special Class - Level II means an:

Engineering Tradesperson Special Class (Automotive) - Level II; or

Engineering Tradesperson Special Class (Electrical/Electronic) - Level II; or

Engineering Tradesperson Special Class (Mechanical) - Level II; or

Engineering Tradesperson Special Class (Fabrication) - Level II,

who has completed the minimum training requirements specified in clause 1.6.2(4) or equivalent.

(M) Delete subclause 1.6.12(1) and the preamble of this clause and insert in lieu thereof the following:

(1) Advanced Engineering Tradesperson - Level I

(Relativity to C10 - 125%)

An Advanced Engineering Tradesperson Level I means an:

Advanced Engineering Tradesperson (Automotive) - Level I; or

Advanced Engineering Tradesperson (Electrical/Electronic) - Level I; or

Advanced Engineering Tradesperson (Mechanical) - Level I; or

Advanced Engineering Tradesperson (Fabrication) - Level I,

who has completed, (including appropriate on-the-job training) the minimum training requirements specified in clause 1.6.2(4) or equivalent.

(N) Delete subclause 1.6.13(1) and the preamble of this clause and insert in lieu thereof the following:

(1) Advanced Engineering Tradesperson - Level II

(Relativity to C10 - 130%)

An Advanced Engineering Tradesperson - Level II means an:

Advanced Engineering Tradesperson (Automotive) - Level II; or

Advanced Engineering Tradesperson (Electrical/Electronic) Level II; or

Advanced Engineering Tradesperson (Mechanical) - Level II; or

Advanced Engineering Tradesperson (Fabrication) - Level II,

who has completed (including appropriate on-the-job training) the minimum training requirements specified in clause 1.6.2(4) or equivalent.

3. Clause 2.1 – Contract of Service:

(A) Delete subclause 2.1.1(2) of this clause and insert in lieu thereof the following:

(2) For the purposes of 2.1.1(1), the definition of "serious misconduct" is misconduct, including conduct as defined by regulation 1.07 of the Fair Work Regulations 2009 (as amended from time to time), of such a nature that it would be unreasonable to require the employer to continue the employment of the employee concerned during the required period of notice.

(B) Delete subclause 2.1.2(1) of this clause and insert in lieu thereof the following:

(1) In order to terminate the employment of an employee the employer shall give the employee the following notice in writing:

PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER	PERIOD OF NOTICE
Not more than 1 year	At least 1 week
More than 1 year but less than 3 years	At least 2 weeks
More than 3 years but less than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(C) Delete subclause 2.1.2(5), (6), (7), (8), (9) and (10) of this clause and insert in lieu thereof the following:

(5) The period of notice in this subclause shall not apply to those employees who are exempt from receiving notice under Subdivision A of Division 11 of Part 2-2 of the *Fair Work Act 2009*, as amended from time to time.

(6) For the purpose of this clause an employee's continuity of service has the same meaning as prescribed in section 22 of the *Fair Work Act 2009*.

(7) In order to terminate the employment of a casual employee the employer shall give the employee one hour's notice, or one hour's wages in lieu of notice.

(8) The provisions of this subclause shall not apply in any case where the employee's contract of service is changed from PART 1 - GENERAL to PART 2 – CONSTRUCTION WORK, of this Award.

(D) Delete subclause 2.1.3(1) of this clause and insert in lieu thereof the following:

(1) The notice of termination required to be given by an employee shall be the same as that required of an employer, save and except that there shall be no additional notice based on the age of the employee concerned, and the required period of notice to be given by any casual employee shall be one hour.

(E) Delete subclause 2.1.7(2) and (3) of this clause and insert in lieu thereof the following:

(2) The provisions of 2.1.7(1) also apply where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented but only if, and to the extent that, the employer and the union or unions concerned so agree or, in the event of disagreement, the Commission so determines.

(3) Where the stoppage of work has resulted from a breakdown of the employer's machinery the Commission, in determining a dispute under 2.1.7(2), shall have regard for the duration of the stoppage and the endeavours made by the employer to repair the breakdown.

4. Clause 2.2 – Training: Delete subclause 2.2.5 and 2.2.6 of this clause and insert in lieu thereof the following:

2.2.5 Any disputes arising in relation to 2.2.2 and 2.2.3 shall be subject to the provisions of Clause 7. - Dispute Resolution Procedure of this Award.

5. Clause 2.3 – Redundancy:

(A) Delete subclause 2.3.3(1) of this clause and insert in lieu thereof the following:

(1) In addition to the period of notice prescribed in 2.1.2(1) in Clause 2.1 - Contract of Service, of this Award, for ordinary termination, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in 2.3.1 shall be entitled to the following amount of severance pay in respect of a continuous period of service.

PERIOD OF CONTINUOUS SERVICE	SEVERANCE PAY
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

"Weeks' Pay" means the ordinary weekly rate of wage for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(B) Delete subclause 2.3.6(1) of this clause and insert in lieu thereof the following:

(1) During the period of notice of termination of employment given by an employer, an employee whose employment is to be terminated for reasons set out in 2.3.1 shall for the purpose of seeking other employment be entitled to be absent from work during each week of notice up to a maximum of eight ordinary hours without deduction of pay. The eight hours need not be consecutive.

(C) Delete subclause 2.3.8 including heading of this clause and insert in lieu thereof the following:

2.3.8 Termination / Redundancy Fund

Employers may, at their discretion, utilise a fund to meet their liabilities to their employees accrued pursuant to the term of this clause, provided that such fund shall provide a level of benefits equal to those prescribed by this clause.

(C) Delete subclause 2.3.10 of this clause and insert in lieu thereof the following:

This clause shall not apply where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice or in the case of casual employees, apprentices or employees engaged for a specific period of time or for a specified task or tasks.

(D) Delete subclause 2.3.11 of this clause and insert in lieu thereof the following:

Subject to an order of the Commission, in a particular redundancy case, clause 2.3.3 – Severance Pay shall not apply to employers who employ less than fifteen (15) employees.

6. Clause 3.1 Hours:

(A) Delete subclause 3.1.1(2) of this clause and insert in lieu thereof the following:

(2) Subject to the provisions of 3.1.3 the ordinary hours of the work shall be an average of 38 per week to be worked on one of the following bases.

(a) 38 hours within a work cycle not exceeding seven (7) consecutive days; or
(b) 76 hours within a work cycle not exceeding fourteen (14) consecutive days; or
(c) 114 hours within a work cycle not exceeding twenty-one (21) consecutive days; or
(d) 152 hours within a work cycle not exceeding twenty-eight (28) consecutive days; or
(e) where the ordinary hours being worked each day are in accordance with 3.1.1(5)(b), any other work cycle during which a weekly average of 38 ordinary hours are worked; or
(f) for the purposes of 3.1.3(6) any other work cycle during which a weekly average of 38 ordinary hours are worked as may be agreed in accordance with 3.1.3(6).

(B) Delete subclause 3.1.1(5)(b)(i) of this clause and insert in lieu thereof the following:

(i) the employer and the employees concerned being guided by the Occupational Health and Safety provisions of the ACTU Code of Conduct on 12 Hour Shifts, as outlined in Appendix 3 of this Award;

(C) Delete subclause 3.1.2(3)(b)(i) of this clause and insert in lieu thereof the following:

(i) the employer and the employees concerned being guided by the Occupational Health and Safety provisions of the ACTU Code of Conduct on 12 Hour Shifts, as outlined in Appendix 3 of this Award;

(D) Delete subclause 3.1.3(1)(e) of this clause and insert in lieu thereof the following:

(e) except in the case of continuous shift employees, where the ordinary hours of work are worked within an arrangement as provided in 3.1.3(1)(c) or 3.1.3(1)(d), any day off duty shall be arranged so that it does not coincide with a public holiday prescribed in 6.7.1 of Clause 6.7 - Public Holidays of this Award.

(7) Clause 3.2 Overtime:

(A) Delete subclause 3.2.1(3)(b) of this clause and insert in lieu thereof the following:

(b) Work done on any day prescribed as a public holiday under this Award shall be paid for at the rate of double time and a half.

(B) Delete subclause 3.2.2(2) of this clause and insert in lieu thereof the following:

(2) Subject to the provisions of 3.2.2(3) all time worked in excess of or outside the ordinary working hours, or on a shift other than a rostered shift, shall be paid for at the rate of double time, except where an employee is called upon to work a sixth shift in not more than one week in any four weeks, when the employee shall be paid for such shift at time and a half for the first four hours and double time thereafter.

For the purposes of this subclause, ordinary hours shall mean the hours of work fixed in an establishment in accordance with 3.1.3 of Clause 3.1 - Hours.

(C) Delete subclause 3.2.3(3)(d) of this clause and insert in lieu thereof the following:

(d) Where an employee (other than a casual employee or an employee engaged on continuous shift work) is called into work on a Sunday or public holiday prescribed under this Award preceding an ordinary working day, the employee shall, wherever reasonably practicable, be given ten consecutive hours off duty before the employee's usual starting time on the next day. If this is not practicable, then the provisions of 3.2.3(3)(b) and 3.2.3(3)(c) shall apply, the necessary changes having been made.

(D) Delete subclause 3.2.3(3)(f) of this clause and insert in lieu thereof the following:

(f) Overtime worked as a result of a recall shall not be regarded as overtime for the purpose of 3.2.3(3) when the actual time worked is less than three hours on such recall or on each of such recalls.

(E) Delete subclause 3.2.3(9)(b) of this clause and insert in lieu thereof the following:

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the overtime;

(ii) the employee's personal circumstances (including any family responsibilities);

(iii) the conduct of the operations or business in relation to which the employee is required or requested to work the overtime;

(iv) any notice given by the employer of the requirement or request that the employee work the overtime;

(v) any notice given by the employee of the employee's intention to refuse to work the overtime;

(vi) whether any of the overtime is on a public holiday in the area of the State where the employee is required or requested to work the overtime;

(vii) the employee's hours of work over the 4 weeks ending immediately before the employee is required or requested to work the overtime; and

(viii) any other relevant matter.

(F) Delete subclause 3.2.4 of this clause and insert in lieu thereof the following:

3.2.4 The provisions of this clause do not operate so as to require payment of more than double time rates, or double time and a half on a public holiday prescribed under this Award, for any work except and to the extent that the provisions of Clause 5.2 - Special Allowances and Facilities of this Award apply to that work.

(8) Clause 3.3 Shift Work:

(A) Delete subclause 3.3.3(2) of this clause and insert in lieu thereof the following:

(2) The sequence of work shall not be deemed to be broken under the preceding paragraph by reason of the fact that work on the process is not carried out on a Saturday or Sunday or any other day that the employer observes a shut down for the purpose of allowing a 38 hour week or on any public holiday.

(B) Delete subclause 3.3.5 of this clause and insert in lieu thereof the following:

3.3.5 A shift employee when on afternoon or night shift shall be paid for such shift fifteen per cent (15%) more than the employee's ordinary rate prescribed by this Award.

(C) Delete subclause 3.3.6(1) of this clause and insert in lieu thereof the following:

3.3.6 (1) All work performed on a rostered shift, when the major portion of such shift falls on a Saturday, Sunday or a public holiday, shall be paid for as follows -

Saturday - at the rate of time and one half.

Sunday - at the rate of time and three quarters.

Public Holidays - at the rate of double time.

(D) Delete subclause 3.3.7 of this clause and insert in lieu thereof the following:

3.3.7 A continuous shift employee who is not required to work on a public holiday which falls on the employee's rostered day off shall be allowed a day's leave with pay to be added to annual leave or taken at some other time if the employee so agrees.

(9) Clause 4.2 Supported Wage System for Employees with Disabilities:

(A) Delete subclause 4.2.1(1) and (2) of this clause and insert in lieu thereof the following:

(1) "Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full Award wages because of a disability as documented in "Supported Wages System Handbook". The Handbook is available from the following website: www.jobaccess.gov.au

(2) "Approved Assessor" means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.

(B) Delete subclause 4.2.1(4) of this clause and insert in lieu thereof the following:

(4) "Assessment instrument" means the tool provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

(C) Delete subclause 4.2.2 of this clause and insert in lieu thereof the following:

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension. (The clause does not apply to any existing employee who has a claim against the employer that is subject to the provisions of workers' compensation legislation or any provision of this Award relating to the rehabilitation of employees who are injured in the course of their current employment.)

(D) Delete subclause 4.2.3 of this clause and insert in lieu thereof the following:

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (subclause 4.2.4)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

Provided that the minimum amount payable shall be not less than that prescribed in Schedule D of the national Miscellaneous Award 2020, as amended from time to time.

* Where a person's assessed capacity is 10%, he or she shall receive a high degree of assistance and support.

(E) Delete subclause 4.2.4 of this clause and insert in lieu thereof the following:

For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by an approved assessor, having consulted the employer and employee and, if the employee so desires, the union.

(F) Delete subclause 4.2.9(3) of this clause and insert in lieu thereof the following:

(3) The minimum amount payable to the employee during the trial period shall be no less than that prescribed in Schedule D of the national Miscellaneous Award 2020, as amended from time to time.

(10) Clause 4.4 Junior Employees: Delete this clause and insert in lieu thereof the following:

Junior employees shall not be employed in any occupation to which apprentices may be taken pursuant to the provisions of the *Vocational Education and Training Act 1996*, or any successor legislation.

(11) Clause 4.5 Part Time Employment: Delete subclause 4.5.3 of this clause and insert in lieu thereof the following:

4.5.3 A part time employee who works in excess of the hours fixed under the contract of employment shall be paid overtime in accordance with Clause 3.2 - Overtime of this Award.

(12) Clause 4.6 Payment of Wages:

(A) Delete subclause 4.6.3(1) and (2) of this clause and insert in lieu thereof the following:

(1) An employee whose ordinary hours are arranged in accordance with 3.1.3(1)(c) or 3.1.3(1)(d) of Clause 3.1 - Hours of this Award and who is paid wages in accordance with 4.6.2(2) and is absent from duty (other than on paid leave) shall, for each day the employee is so absent, lose average pay for that day calculated by dividing the employee's average weekly wage rate by 5.

An employee who is so absent from duty for part of a day shall lose average pay for each hour the employee is absent by dividing the employee's average daily pay rate by 8.

(2) Provided when such an employee is absent from duty (other than on paid leave) for a whole day the employee will not accrue a "credit" because the employee would not have worked ordinary hours that day in excess of 7 hours 36 minutes for which the employee would otherwise have been paid. Consequently, during the week of the work cycle the employee is to work less than 38 ordinary hours the employee will not be entitled to average pay for that week. In that week, the average pay will be reduced by the amount of the "credit" the employee does not accrue for each whole day during the work cycle the employee is absent (other than on paid leave).

The amount by which an employee's average weekly pay will be reduced when the employee is absent from duty (other than on paid leave) is to be calculated as follows:

$$\text{Total of "credits" not accrued during cycle} \times \frac{\text{average weekly pay}}{38}$$

Examples

1 Employee takes one day off without authorisation in first week of cycle

Week of Cycle	Payment
1st week	= average weekly pay less one day's pay (i.e. 1/5th)
2nd & 3rd weeks	= average weekly pay each week
4th Week	= average pay less credit not accrued on day of absence
	= average pay less 0.4 hours x (average weekly pay / 38)

2. Employee takes each of the 4 days off without authorisation in the 4th week.

Week of Cycle	Payment
1st, 2nd & 3rd weeks	= average pay each week
4th week	= average pay less 4/5ths of average pay for the four days absent less total of credits not accrued that week
	= 1/5th average pay less 4 x 0.4 hours x (average weekly pay / 38)
	= 1/5th average pay less 1.6 hours x (average weekly pay / 38)

(B) Delete subclause 4.6.5 of this clause and insert in lieu thereof the following:

In the event that an employee who is paid by cash or cheque, by virtue of the arrangement of the employee's ordinary working hours, is to take a day off duty on a day which coincides with pay day, such employee shall be paid no later than the working day immediately following pay day. Provided that, where the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

(C) Delete subclause 4.6.6 of this clause and insert in lieu thereof the following:

An employee's wages may be paid by cash, cheque or direct transfer into the employee's bank (or other recognised financial institution) account.

(D) Delete subclause 4.6.8 of this clause and insert in lieu thereof the following:

Where an employee requests the employer to state in writing with respect to each week's wages the amount of wages to which the employee is entitled, the amount of deductions made therefrom, the net amount being paid, and the number of hours worked, the employer shall do so. In the case of employees paid by cash or cheque, this shall occur not less than two (2) hours before the employee is paid.

(13) Clause 4.7 Time and Wages Record:

(A) Delete subclause 4.7.4(8) of this clause and insert in lieu thereof the following:

(8) any other information in respect of the employee required under the Award to be recorded; and

(9) any information, not otherwise covered by this subsection, that is necessary to show that the remuneration and benefits received by the employee comply with the Award.

(B) Delete subclause 4.7.6(1)(b) of this clause and insert in lieu thereof the following:

(b) let the person inspect the employment records at the employer's premises, or other convenient place, during usual business hours.

(14) Clause 4.8 Wages and Supplementary Payments:

(A) At the end of subclause 4.8.3 insert the following note:

Note:

* *Adult apprentices aged 21 or more are entitled to receive the minimum adult apprentice wage, as set out in Clause 4.1.10 of this Award, or the relevant amount referred to above, whichever is the higher.*

* The General Order on Wage structures for school-based and part-time apprentices applies to apprentices working under this Award.

(B) Delete subclause 4.8.6(3) and (4) of this clause and insert in lieu thereof the following:

(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(4) A tradesperson or apprentice shall replace or pay for any tool supplied by the employer if lost through the employee's negligence.

(C) Delete subclause 4.8.7 of this clause and insert in lieu thereof the following:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $27.60 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

(15) Clause 4.9 Traineeships:

(A) Delete first paragraph of subclause 4.9.3 of this clause and insert in lieu thereof the following

"Appropriate State Legislation" means the *Vocational Education and Training Act 1996*, or any successor legislation.

(B) Delete subclause 4.9.5(1) of this clause and insert in lieu thereof the following

(1) A full time Trainee shall be engaged for a maximum of one (1) year's duration, except in respect of AQF III and AQF IV traineeships which may extend up to two (2) years full time, provided that a Trainee shall be subject to a satisfactory probation period of one month which may be reduced at the discretion of the employer. By agreement in writing, and with the consent of the Training Authority, the relevant employer and the Trainee may vary the duration of the Traineeship and the extent of approved training provided that any agreement to vary is in accordance with the relevant Traineeship Scheme. A part-time trainee shall be engaged in accordance with the provisions of 4.9.6(5).

(C) Delete subclause 4.9.6(2)(a) (b) and (c) of this clause and insert in lieu thereof the following

(a) Industry/Skill Level A:

Where the accredited training course and work performed are for the purpose of generating skills which have been defined for work at Industry/Skill Level A.

Highest Year of Schooling Completed

HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10 $	Year 11 $	Year 12 $
	$	$	$
	269.00	320.00	394.00
plus 1 year out of school	320.00	394.00	456.00
plus 2 year out of school	394.00	456.00	534.00
plus 3 year out of school	456.00	534.00	610.00
plus 4 year out of school	534.00	610.00	
plus 5 years/more	610.00		

(b) Industry/Skill Level B:

Where the accredited training course and work performed are for the purpose of generating skills which have been defined for work at Industry/Skill Level B.

Highest Year of Schooling Completed
HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10 $	Year 11 $	Year 12 $
	$	$	$
	269.00	320.00	385.00
plus 1 year out of school	320.00	385.00	439.00
plus 2 year out of school	385.00	439.00	517.00
plus 3 year out of school	439.00	517.00	590.00
plus 4 year out of school	517.00	590.00	
plus 5 years/more	590.00		

(c) Industry/Skill Level C:

Where the accredited training course and work performed are for the purpose of generating skills which have been defined for work at Industry/Skill Level C.

Highest Year of Schooling Completed
HIGHEST YEAR OF SCHOOLING

School Leaver	Year 10 $	Year 11 $	Year 12 $
	$	$	$
	269.00	320.00	382.00
plus 1 year out of school	320.00	382.00	429.00
plus 2 year out of school	382.00	429.00	482.00
plus 3 year out of school	429.00	482.00	541.00
plus 4 year out of school	482.00	541.00	
plus 5 years/more	541.00		

(D) Delete subclause 4.9.6(4) of this clause and insert in lieu thereof the following

Trainees undertaking an AQFIV traineeship shall receive the relevant weekly wage rate for AQFIII trainees at Skill/Industry Levels A, B and C as applicable with the addition of 3.8% of that wage rate.

(16) Clause 5.2 Special Allowances and Facilities:

(A) Delete subclause 5.2.3 of this clause and insert in lieu thereof the following:

5.2.3 Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Commission determines that employees employed under this Award are unduly affected by that dust, the Commission may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding $1.03 per hour.

(B) Delete subclause 5.2.8(1) of this clause and insert in lieu thereof the following:

5.2.8 (1) Where in the opinion of the Commission, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Commission may –

(a) Fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) Fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) Prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Commission sees fit.

(C) Delete subclause 5.2.19(3), (4) and (5) of this clause and insert in lieu thereof the following:

(3) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(4) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

(D) Delete subclause 5.2.21 of this clause and insert in lieu thereof the following:

5.2.21 An employee, holding a Provide First Aid certificate (HLTAID011) or equivalent, appointed by the employer to perform first aid duties, shall be paid $12.00 per week in addition to the employee's ordinary rate.

(E) Delete subclause 5.2.22 of this clause and insert in lieu thereof the following:

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant Regulation in force under the *Electricity Act 1945*, shall be paid an allowance of $24.70 per week.

(17) Clause 6 Leave: Delete entire clause 6. Leave and insert in lieu thereof the following:

6. - LEAVE

6.1 - ANNUAL LEAVE

6.1.1 (1) Annual Leave is provided for in the *Minimum Conditions of Employment Act 1993*.

(2) (a) An employee before going on leave shall be paid the wages the employee would have received in respect of the ordinary time the employee would have worked had the employee not been on leave during the relevant period.

(b) Subject to 6.1.1(3) an employee shall, where applicable, have the amount of wages to be received for annual leave calculated by including the following where applicable:

(i) The rate applicable to the employee as prescribed by either:

- Clause 4.8 – Wages and Supplementary Payments of PART 1 – GENERAL; or
- Clause 13 – Wages of PART 2 – CONSTRUCTION WORK;

and the rates prescribed by the following clauses:

- Clause 5.2.11 (Chemical, Artificial Manure and Cement Work);
- Clause 5.2.12 (Abattoirs and Tallow Rendering Works);
- Clause 5.2.13 (Timber and Sawmill Works);
- Clause 5.6 - Location Allowances;

(ii) Subject to 6.1.1(3)(b) the rate prescribed for work in ordinary time by Clause 3.3 - Shift Work according to the employee's roster or projected roster including Saturday and Sunday shifts;

(iii) The rate payable pursuant to Clause 5.1 - Higher Duties calculated on a daily basis, which the employee would have received for ordinary time during the relevant period whether on a shift roster or otherwise;

(iv) Any other rate to which the employee is entitled in accordance with the contract of employment for ordinary hours of work; provided that this provision shall not operate so as to include any payment which might have become payable to the employee as reimbursement for expenses incurred, nor any payment which is of a similar nature to or is paid for the same reasons as or is paid in lieu of those payments prescribed by the following clauses:

- Clause 3.2 – Overtime;

- Clause 5.2 - Special Allowances and Facilities / Clause 15.1 - Special Allowances and Provisions;
- Clause 5.3 - Car Allowance;
- Clause 5.4 - Fares and Travelling Time / Clause 15.2 - Allowance for Travelling and Employment; and
- Clause 5.5 - Distant Work / Clause 15.3 - Distant Work.

(3) In addition to the payment prescribed in 6.1.1(2), an employee shall receive a loading calculated on the rate of wage prescribed by that paragraph. This loading shall be as follows -

(a) Day Employees - An employee who would have worked on day work had the employee not been on leave - a loading of 17.5%.

(b) Shift Employees - An employee who would have worked on shift work had the employee not been on leave shall receive whichever is the greater of:

(i) a loading of 17.5%; or

(ii) the shift loadings prescribed by Clause 3.3 - Shift Work and, if applicable, payment for work on a regularly rostered sixth shift in not more than one week in any four weeks had the employee not been on leave during the relevant period.

Where the loading of 17.5% is paid, then such loading shall be added to the rate of wage prescribed by 6.1.1(2) but not including 6.1.1(2)(b)(ii) in lieu of the shift loadings and the said payment.

(c) Except as prescribed in 6.1.4 and Clause 16.1 - Annual Leave Loading of PART 2 - CONSTRUCTION WORK, the loading prescribed by this paragraph shall not apply to proportionate leave on termination.

6.1.2 (1) A seven (7) day shift employee, i.e. a shift employee who is rostered to work regularly on Sundays and public holidays shall be allowed one week's leave in addition to the leave to which the employee is otherwise entitled under this clause.

(2) Where an employee with twelve (12) months' continuous service is engaged as a seven (7) day shift employee, the employee shall be entitled to have the period of annual leave to which the employee is otherwise entitled under this clause increased by one twelfth of a week for each completed month the employee is continuously so engaged.

6.1.3 If any public holiday listed in Clause 6.7 falls within an employee's period of annual leave and is observed on a day that would have been an ordinary working day for the employee, the period of annual leave is extended by one day for each such public holiday.

6.1.4 (1) Upon termination, an employee shall be paid for any untaken annual leave that relates to a completed year of service at the rate prescribed in 6.1.1(2) and 6.1.1(3) unless -

(a) the employee has been justifiably dismissed for misconduct; and

(b) the leave relates to a year of service that was completed after the misconduct occurred.

(2) If an employee lawfully leaves the employment or the employment is terminated by the employer through no fault of the employee, the employee shall be paid for any untaken pro rata annual leave at the rate of wage prescribed by 6.1.1(2), in respect of each completed week of continuous service that does not relate to a completed year of service.

6.1.5 Where an employer closes down the business, or a section or sections thereof, for the purposes of allowing annual leave to all or the bulk of the employees in the business, or section or sections concerned, the following provisions shall apply:-

(1) The employer may by giving not less than one (1) month's notice of the intention so to do, stand off for the duration of the close down all employees in the business or section or sections concerned.

(2) An employer may close down the business for one or two separate periods for the purpose of granting annual leave in accordance with this subclause. If the employer closes down the business in two separate periods one of those periods shall be for a period of at least three consecutive weeks. Provided that where the majority of the employees in the business or section or sections concerned agree, the employer may close down the business in accordance with this subclause in two separate periods neither of which is of at least three (3) consecutive weeks, or in three (3) separate periods. In such cases the employer shall advise the employees concerned of the proposed date of each close down before asking them for their agreement.

6.1.6 (1) An employer may close down the business, or a section or sections thereof, for a period of at least three (3) consecutive weeks and grant the balance of the annual leave due to an employee in one (1) continuous period in accordance with a roster. Provided that by agreement with the majority of employees concerned, an employer may close down the plant for a period of at least fourteen (14) consecutive days including non-working days and grant the balance of the annual leave due to an employee by mutual arrangement.

(2) An employer may close down the business, or a section or sections thereof for a period of less than three (3) consecutive weeks and allow the balance of the annual leave due to an employee in one or two continuous periods, either of which may be in accordance with a roster. In such a case the granting and taking of annual leave shall be subject to the agreement of the employer and the majority of the employees in the business, or a section or sections thereof respectively and before asking the employees concerned for their agreement, the employer shall advise them of the proposed date of the close down or close downs and the details of the annual leave roster.

6.2 - SICK / CARER'S LEAVE

6.2.1 (1) Sick / carer's leave is provided for in the *Minimum Conditions of Employment Act 1993*.

(2) If in the first or successive years of service with the employer an employee is absent on the ground of personal ill health or injury for a period longer than the employee's entitlement to paid sick/carer's leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick/carer's leave during that year of service.

6.2.2 The employee shall as soon as reasonably practicable advise the employer of his or her inability to attend for work, the reason for the absence and the estimated duration of the absence. Provided that such advice, other than in extraordinary circumstances shall be given to the employer within 24 hours of the commencement of the absence.

6.2.3 For absences due to personal illness or injury, an employee shall not be required to provide evidence of the entitlement with respect to absences of two days or less.

6.2.4 (1) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when the employee is absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(2) Application for replacement shall be made within seven (7) days of resuming work and then only if the employee was confined to place of residence or a hospital as a result of the employee personal ill health or injury for a period of seven (7) consecutive days or more and the employee produces a certificate from a registered medical practitioner that the employee was so confined. Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with 6.2.2 if the employee is unable to attend for work on the working day next following the employee annual leave.

(3) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick/carer's leave to which the employee was entitled at the time the employee proceeded on annual leave and shall not be made with respect to fractions of a day.

(4) Where paid sick leave has been granted by the employer in accordance with 6.2.4(1), 6.2.4(2) and 6.2.4(3), that portion of the annual leave equivalent to the paid sick leave is hereby replaced by the paid sick leave and the replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of Clause 6.1 - Annual Leave.

(5) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in Clause 6.1 - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

6.2.5 Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with section 6 of the *Long Service Leave Act 1958*, the paid sick/carer's leave standing to the credit of the employee at the date of transmission from service with the transmittor shall stand to the credit of the employee at the commencement of service with the transmittee and may be claimed in accordance with the provisions of this clause.

6.3 - LONG SERVICE LEAVE

An employee covered by this Award is entitled to long service leave in accordance with the *Long Service Leave Act 1958*.

6.4 - BEREAVEMENT LEAVE

6.4.1 Bereavement leave is provided for in the *Minimum Conditions of Employment Act 1993*.

6.4.2 Payment in respect of bereavement leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with any shift roster or during a period of any other kind of leave.

6.4.3 For the purposes of this clause the pay of an employee employed on shift work shall be deemed to include any usual shift allowance.

6.5 - PARENTAL LEAVE

6.5.1 Parental leave is provided for in accordance with Division 5 of Part 2-2 of the *Fair Work Act 2009* (Cth) and the *Minimum Conditions of Employment Act 1993*.

6.6 - (DELETED)

6.7 - PUBLIC HOLIDAYS

6.7.1 (1) The following days or the days observed in lieu shall, subject to this clause and to 3.2.1(3) of Clause 3.2 - Overtime of this Award, be allowed as public holidays without deduction of pay, namely -

New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Western Australia Day, Sovereign's Birthday, Christmas Day and Boxing Day.

Provided that another day may be taken as a public holiday by arrangement between the parties in lieu of any of the days named in this subclause.

(2) Employers located north of the 26th parallel of south latitude or outside the South West Land Division may provide an additional one week of annual leave to their employees in lieu of observing Australia Day, Easter Monday, Western Australia Day, Sovereign's Birthday and Boxing Day as public holidays, in which case these days are not to be treated as public holidays for the purposes of the Award.

(3) When any of the days mentioned in 6.7.1(1) falls on a Saturday or a Sunday the public holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or on a Monday the public holiday shall be observed on the next succeeding Tuesday. In each case the substituted day shall be a public holiday without deduction of pay and the day for which it is substituted shall not be a public holiday.

6.7.2 On any public holiday not prescribed as a holiday under this Award, the employer's establishment or place of business may be closed. An employee, other than a casual employee, who in any area of the State is not required to work on that day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day. If work is done on that day, ordinary rates of pay shall apply.

6.7.3 A part time employee shall be allowed the public holidays prescribed by this clause without deduction of pay in respect of each public holiday which is observed on a day ordinarily worked by the part time employee

(18) Clause 7 Dispute Resolution Procedure: Delete subclause 7.4(4) of this clause and insert in lieu thereof the following:

(4) Sensible time limits shall be allowed for the completion of the various stages of the discussions.

(a) Generally, at least seven days should be allowed for all stages of the discussions to be finalised.

(b) In relation to the following clauses, a matter may be referred to the Commission in accordance with (5) after at least 24 hours has elapsed from the relevant party(s) being notified of the matter:

(i) 1.6.1 – meaning of construction work;

(ii) 2.1.7(2) - stand down where the employee cannot be usefully employed through any cause which the employer could not reasonably have prevented;

(iii) 5.2.3 – grain dust;

(iv) 5.2.8 – excessive heat or exceptionally oppressive;

(v) 13.4 – construction allowances; or

(vi) 15.1.1 – obnoxious, unusually dirty or extreme confined spaces.

(19) Clause 8.4 Board of Reference: Delete entire clause and insert in lieu thereof the following:

8.4 - (DELETED)

(20) Clause 9 Superannuation: Delete entire clause and insert in lieu thereof the following:

9. - SUPERANNUATION

9.1 An employer shall pay contributions in accordance with the Superannuation Legislation on behalf of each eligible employee to an Approved Fund or scheme chosen in accordance with 9.3 - Employer Contributions.

9.2 Definitions:

"Approved Fund" means a superannuation fund or scheme that is a complying superannuation fund or scheme within the meaning of the Superannuation Legislation and to which, under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme.

"Eligible employee" means an employee who is entitled to receive employer superannuation contributions in accordance with the Superannuation Legislation.

"Ordinary time earnings" has the same meaning as provided for in the Superannuation legislation, and includes an employee's award classification rate (including supplementary payment), any regular over-award payment, tool allowance, leading hand allowance and shift loading, including weekend and public holiday rates where the shift worked is part of the employee's ordinary hours of work.

"Relevant Fund" means an Approved Fund nominated by the employee, which is able to accept contributions from the employer.

"Superannuation Legislation" means the Federal legislation as varied from time to time, governing the superannuation rights and obligations of the parties, which includes the *Superannuation Guarantee (Administration) Act 1992*, the *Superannuation Guarantee Charge Act 1992*, the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Resolution of Complaints) Act 1993*.

9.3 Employer Contributions:

(1) An employer shall contribute the minimum percentage of ordinary time earnings per eligible employee (as required by the Superannuation Legislation) into one of the following approved funds:

(a) Any fund the employer is required to pay into in accordance with the Superannuation Legislation;

(b) AustralianSuper;

(c) Any Approved Fund agreed between the employer, employees and their Union or Unions, where applicable;

(d) Any Approved Fund which has application to employees in the principal business of the employer, where employees covered by this Award are a minority of award-covered employees;

(e) Any other Approved Fund to which an employer or employee who is a member of the religious fellowship known as Brethren elects to contribute; or

(f) Any Relevant Fund which is nominated by the employee.

(2) Employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.

(3) No contributions shall be made for periods of unpaid leave, or unauthorised absences, of one day or more.

9.4 (1) Employees may nominate a Relevant Fund or scheme into which the contributions by an employer on behalf of the employee will be made.

(2) The employer shall notify the employee of the entitlement to nominate an Approved Fund or scheme as a Relevant Fund as soon as practicable.

(3) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the Relevant Fund or scheme to which contributions are to be made.

(4) The employer shall not unreasonably refuse to agree to a change of Relevant Fund or scheme requested by an employee.

(5) The employer is required to make contributions to any Approved Fund or scheme they are required to pay into in accordance with the Superannuation Legislation, until the employee nominates a Relevant Fund or scheme. If the Superannuation Legislation does not require contributions to be made to a specific Approved Fund or scheme, the employer is required to make contributions to an Approved Fund or scheme nominated by the employer, until the employee nominates a Relevant Fund or scheme.

9.5 Subject to the Trust Deed to the Fund of which an employee is a member, the following provisions will apply:

(1) Paid Leave

Contributions must continue whilst a member of a Fund is absent on annual leave, sick/carer's leave, long service leave, public holidays, jury service, bereavement leave, or other paid leave.

(2) Unpaid Leave

Contributions will not be required in respect of any period of absence from work without pay of one day or more.

(3) Work Related Injury or Illness

If an eligible employee's absence from work is due to work related injury or work related illness, contributions at the normal rate must continue for the period of the absence provided that:

(a) the member of the fund is receiving workers' compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements or the provisions of this Award;

(b) the person remains an employee of the employer.

9.6 Nothing contained herein shall serve to reduce any superannuation entitlement which an employee was receiving at the time this clause became effective.

(21) Clause 12.1 Contract of Service: Delete entire clause and insert in lieu thereof the following:

12.1 - CONTRACT OF SERVICE

12.1 (1) Subject to 12.1(2), the provisions of Clause 2.1 – Contract of Service of PART 1 – GENERAL also apply to employees working under PART 2 – CONSTRUCTION WORK of this Award.

(2) The provisions of Clause 2.1 - Contract of Service of PART 1 – GENERAL shall not apply in any case where the employee's contract of service is to be changed from PART 2 - CONSTRUCTION WORK to PART 1 - GENERAL of this Award.

(22) Clause 12.2 Apprentices: Delete subclause (2) and insert in lieu thereof the following:

(2) is not less than 19 years of age; or

(23) Clause 12.3 Redundancy:

(A) Delete subclause 12.3.1 (a) and (b) and insert in lieu thereof the following:

12.3.1 (a) Subject to subclause (b), this clause shall apply where an employee ceases, for any reason, to be employed by an employer respondent to this Award, other than for reasons of misconduct.

(b) Should any provisions of the 2005 General Order on Termination, Change and Redundancy (2005 WAIRC 01715) provide more favourable entitlements to an employee than those set out in this clause, the provisions of the General Order will apply to the extent of any such inconsistency.

(B) Delete subclause 12.3.2(4), (5), (6) and (7) and insert in lieu thereof the following:

(4) For the purpose of this clause, continuity of service shall not be broken on account of -

(a) any interruption or termination of employment by the employer if made merely with the intention of avoiding obligations hereunder in respect of leave of absence; or

(b) any absence from work on account of leave lawfully granted by the employer; or

(c) any absence, with reasonable cause, proof whereof shall be provided by the employee;

Provided that in the calculation of continuous service under this subclause, any time in respect of which an employee is absent from work, except on paid leave and public holidays as prescribed by this Award, shall not count as service for the purposes of this clause.

(5) Where an employee remains in his or her employment with the employer and is transferred between construction sites, or between construction work and work of PART 1 - GENERAL of this Award, the period of service on construction work shall be preserved for the purposes of calculating continuous service under the terms of this clause.

(6) An employee who terminates his or her employment before the completion of four weeks' continuous service with the employer shall not be entitled to the provisions of this clause.

(24) Clause 13. Wages:

(A) Delete subclause 13.2(1)(z) and insert in lieu thereof the following:

(z)	Crane Attendant and Dogger	334.70	67.70	463.70	866.10

(B) At the end of subclause 13.3 insert the following note:

Note:

* *Adult apprentices aged 21 or more are entitled to receive the minimum adult apprentice wage, as set out in Clause 13.8(10) of this Award, or the relevant amount referred to above, whichever is the higher.*

* *The General Order on Wage structures for school-based and part-time apprentices applies to apprentices working under this Award.*

(C) Delete subclause 13.4(2) and insert in lieu thereof the following:

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Commission.

(D) Delete subclause 13.6(1)(a) and insert in lieu thereof the following:

(a) $17.10 per week to such tradesperson; or

(25) Clause 14.2 Shift Work: Delete subclause 14.2.2(2) and insert in lieu thereof the following:

(2) The sequence of work shall not be deemed to be broken under the preceding paragraph by reason of the fact that work on the process is not carried out on a Saturday or Sunday or any other day that the employer observes a shut down for the purpose of allowing a 38 hour week or on any public holiday.

(26) Clause 15.1. Special Allowances and Provisions.

(A) Delete subclause 15.1.1(1) and (2) and insert in lieu thereof the following:

15.1.1 (1) Where obnoxious or unusually dirty or extreme confined space conditions are encountered attributable to sources other than normal construction work disabilities, a complaint may be referred to the Commission pursuant to Clause 7. Dispute Resolution Procedure to investigate the specific complaint.

(2) The Commission shall determine the remedial measures required and/or award a disability allowance if deemed necessary in the circumstances.

(B) Delete subclause 15.1.2(1) and insert in lieu thereof the following:

15.1.2 (1) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of an employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 6.2 – Sick / Carer's Leave of PART 1 - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during the employee's absence.

(B) Delete subclause 15.1.3 and 15.1.4 and insert in lieu thereof the following:

15.1.3 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current electrical licence (unrestricted) issued pursuant to the relevant regulation in force under the *Electricity Act 1945*, shall be paid an allowance of $24.70 per week.**(27) Clause 15.3. Distant Work.**

(A) Delete subclause 15.3.4 and insert in lieu thereof the following:

15.3.4 Where an employee who, after one month of employment with an employer, leaves the employment, or whose employment is terminated by the employer "except for incompetency, within one working week of the employee commencing work on the job or for misconduct" and in either instance subject to the provisions of Clause 12. - Contract of Employment of this PART of this Award returns to the place from where the employee first proceeded to the locality,

or to a place less distant than or equidistant to the place where the employee first proceeded, the employer shall pay all expenses - including fares, transport of tools, meals and, if necessary, suitable overnight accommodation incurred by the employee in so returning. Provided that the employer shall in no case be liable to pay a greater amount under this subclause than the employer would have paid if the employee had returned to the locality from which they first proceeded to the job.

(B) Delete subclause 15.3.9 and insert in lieu thereof the following:

15.3.9 Any time in respect of which an employee is absent from work except time for which the employee is entitled to claim payment pursuant to Clause 6.2 - Sick / Carer's Leave or Clause 6.4 – Bereavement Leave of PART 1 - GENERAL of this Award or time spent on public holidays pursuant to Clause 6.7- Public Holidays of PART 1 - GENERAL of this Award shall not count for determining the employee's rights to travel and leave under the provisions of 15.3.8.

(28) Clause 15.4. Special Provision - Western Power. Delete subclause 15.4.2(3) and insert in lieu thereof the following:

(3) A safety footwear allowance of twelve (12) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee.

(29) Appendix 1, Old Classifications.

(A) Delete subclause (2)(g) and insert in lieu thereof the following:

(g) **Foundry Section**	
Annealing stove attendant	K
Assistant furnace operator	L
Core stove or oven attendant	
Dresser and/or fettler and/or grinder	K
Dresser and/or fettler and/or grinder when using a portable machine	K
Employee directly assisting tradesperson	L
Furnace operator -	
Cupola	H
Electric	H
Other	I
Jobbing coremaker	D
Jobbing moulder	D
Plate or machine moulder and/or coremaker -	
first six months' experience	M
second six months' experience	L
third six months' experience	K
Thereafter	H
("experience" includes experience as a moulder or coremaker whether jobbing or machine and whether as a junior or an adult)	
Shot blast and sand blast dresser -	
(i) who is not protected from flying shot and sand by a properly enclosed cabin	I
(ii) who is so protected	L
Tapper out	L

(B) Delete subclause (2)(j) and insert in lieu thereof the following:

(j) **Iron Working and General Section**	
Assistant furnace operator	M
Attendant at small rivet heating or bolt heating or similar type of fires	M
Bender of iron and steel frames used for reinforcing concrete	M
Boiler (inside) cleaner and chipper	K
Cold saw operator	K
Crane attendant and Dogger	K
Crane driver - overhead cabin controlled	H
Dresser and/or fettler and/or grinder	L
Dresser and/or fettler and/or grinder when using portable machine	K
Friction saw operator	M
Furnace operator	J
Lagger -	
first six months' experience	M
second and third six months' experience	L
fourth and fifth six months' experience	K
Thereafter	J
Painter of iron work (other than coach painter and ship painter) - using brush or spray	K

Rigger and splicer or scaffolder on ships and buildings -		
(i)	Certificated rigger or scaffolder	E
(ii)	Rigger or scaffolder (other)	G
(iii)	A certificated rigger or scaffolder, other than a leading hand who, in compliance with the provisions of the regulations made pursuant to the *Occupational Safety and Health Act 1984*, is responsible for the supervision of not less than three employees shall be deemed a leading hand and shall be paid the additional rate prescribed in subparagraph (i) of paragraph (a) of subclause (3) of this clause.	
Rigger and splicer or scaffolder other than on ships and buildings		H
Shot blast and sand blast dresser -		
(i)	who is not protected from flying shot and sand by a properly enclosed cabin	I
(ii)	who is so protected	M
Tool and material storeperson		I

(C) Delete subclause (3) ABB Transmission Pty Ltd, of this clause.

(30) Appendix 3, ABB Power Transmission Pty Ltd: Delete Appendix 3 ABB Power Transmission Pty Ltd and insert in lieu thereof the following:

APPENDIX 3

ACTU CODE OF CONDUCT ON TWELVE HOUR SHIFT WORK

1. Introduction

1.1 The ACTU Executive reaffirms its policy on shift work as set out in the ACTU Working Conditions Policy 1985.

1.2 Shift work involving twelve hour rosters may not introduce a new range of hazards into the workplace but rather may exacerbate existing problems faced by shift workers. The main hazards associated with twelve hour shifts continue to involve disrupted sleep patterns, fatigue, disturbance of eating habits, social dislocation and psychological problems.

1.3 Data show that shift workers (and former shift workers) suffer a higher incidence of gastro-intestinal disorders and gastric and duodenal ulcers than day workers. Shift workers also more often report colds or other respiratory illnesses than their day work counterparts. Further, the incidence of nervous disorders and drug-taking is higher for shift workers than day workers. Similarly, women shift workers have a higher incidence of menstrual problems. Recent studies indicate a link between shift work and cardiac heart disease.

1.4 Twelve hour shift work, with correctly designed rosters, may provide benefits to workers by reducing cumulative fatigue, increasing leisure time and relieving the pressure of seven day shift work. For twelve hour shift work to be advantageous, it is essential the increased leisure time be used for recuperation and recreation and not as an opportunity for additional employment.

1.5 While day work does not involve the same disturbances to circadian rhythms as night work, twelve hour day work may still involve disruption to sleep and eating patterns, fatigue, social dislocation and psychological problems.

2. Introduction of Twelve Hour Shift Work

2.1 The introduction of twelve hour shifts should be permitted only:

- where there is a continuous work process or other special circumstances can be shown to exist;
- where twelve hour shift work will not impose excessive physical or mental workload;
- where, after a proper examination of the possible injurious effects to employee health and social well-being, there are demonstrated benefits for the workers concerned;
- after full consultation with union(s) and the two-thirds majority support of affected workers; and
- in conjunction with possibilities of reducing working time generally.

2.2 The introduction of twelve hour shift work should be on a trial basis for twelve months to allow workers to evaluate changed shifts.

3. Women and Young Persons

3.1 State and Federal Governments need to review legislative restrictions on the employment of women and young persons.

3.2 Unions do not oppose the employment of women on twelve hour shift work but recognise the adverse effects on shift work of all employees.

3.3 Unions should oppose the employment of persons under the age of eighteen on twelve hour night shifts.

4. Control Measures

4.1 Introduction

4.1.1 To minimise the health and safety risks of twelve hour shift work, unions should negotiate the following control measures. The application of these measures may vary according to the industry and workload involved.

4.2 Shift Rosters

4.2.1 Rosters must be developed in consultation with employees through their unions and provision made for ongoing consultation and resolution of disputes about the rosters.

To reduce the hazards associated with night and shift work, rosters should be designed to:

- have a maximum of two night shifts in succession;
- have at least a twelve hour interval between shifts;
- have a short cycle period with regular rotations;
- have the day shift not start before 6.00am;
- allow workers some flexibility about shift change times and shift length; and
- provide in addition to normal breaks, where practicable, an extended rest period during night shift. Breaks should occur at the same time each night.

4.2.2 In all but highly exceptional circumstances, the maximum length of time a worker should have to remain on duty before being relieved is 2 hours.

4.2.3 Overtime should not be worked in conjunction with twelve hour shifts. In no circumstances should overtime work override the basic principles of roster design.

4.2.4 Special rosters are required for workers exposed to hazards, where health and safety standards are determined on the basis of exposure over eight hours. These rosters must be designed in consultation with employees through their unions.

4.3 Award Variations

4.3.1 In accordance with emerging overseas standards, unions should negotiate:

- an additional paid break per shift (the duration of this break will depend on the nature of the work);
- additional paid leave increasing with years of service;
- early retirement provisions;
- where a total rate is used the individual component parts of penalties, allowances, base rate etc. should be identified;
- job security for older and long term shift workers; and
- overtime limitations and maximum weekly hours.

4.4 Administrative Measures

4.4.1 Employer support services can assist in minimising the inconveniences and disturbances of shift work. Such services could include:

- provision of adequate information in everyday language to address such issues as shift rosters, rest, fatigue, the effects of medication and other drugs, employer services etc. (this information should be provided in appropriate languages);
- availability of nutritionally balanced meals and drinks during shifts;
- provision of transport services to and from the workplace and/or arranging more convenient utilisation of available transport facilities;
- provision for rest areas and social/recreational facilities;
- training for supervisors to increase awareness of the special requirements of twelve hour shift working;
- assistance in home renovations to facilitate sleeping during the day; and
- child care facilities.

Employers must negotiate with employees through their unions regarding the provision and administration of such services.

4.5 Health and Related Matters

4.5.1 Introduction:

Most people are affected by shift work. In addition, older workers and those already suffering from digestive disorders, diabetes, heart diseases, psychological problems, alcohol and drug addiction and chronic sleep disturbances, face additional burdens.

4.5.2 Health Services:

4.5.2.1 Employers should provide health supervision and health services for shift workers including:

- pre-placement health examinations to advise the worker about adjustment to the job assignment. Special provisions including transfer to day-time jobs may be required;
- periodic health examinations (within 12 months after starting night work and regularly thereafter). Again, transfer provisions or readjustment of the job assignment may be required; and

- health counselling and preventative health care including temporary or permanent transfer to day-time work.

4.5.3 Procedures Following Health Surveillance:

4.5.3.1 The results of health surveillance should be confidential to the worker and should be released to a third party (e.g. the employer) only with the written consent of the individual concerned. All results should be accompanied by a clear explanation of what they mean in practice. A certificate of fitness (or otherwise) should be provided to the employer by the medical practitioner. Aggregate data should be provided to unions.

4.5.3.2 Where there is a need to transfer from shift work, a period of adjustment should be provided to enable the worker to adapt to any reduction in income. Consideration should also be given to the preservation of superannuation entitlements for long-term shift workers who subsequently move to lower paid work for health reasons.

4.5.3.3 Where it is not possible to continue shift work for health reasons, the employer shall take all necessary steps to find suitable alternative employment for the worker, and shall be required to maintain.

(31) Appendix 4, Architectural Aluminium Fabrication Classification – Clause 2 Definitions: Delete Wage Group C 11, Architectural Aluminium Fabrication Employee level IV paragraph 5 and insert in lieu thereof the following:

5. Operates flexibly across all area of aluminium fabrication workshop activities.

Indicative of the tasks which an employee at this level may perform are the following:

- Use of precision measuring instruments;
- Machine setting, loading and operation;
- Inventory and store control including;
  - licensed operation of all appropriate materials handling equipment;
  - use of tools and equipment within the scope (basic non-trades) maintenance;
  - computer operation at a level higher than that of an employee at C 12 level;
- Intermediate keyboard skills;
- Basic engineering and fault finding skills;
- Licensed and certified for forklift, and crane driving operations to a level of higher than C 12;
- Has a knowledge of the employer's operation as it relates to production processes;
- Lubricates production machinery equipment;
- Assists in the provision of on-the-job training in conjunction with tradespersons and supervisors/trainers.
- Complete production and assembly of all products with the aluminium fabrication workshop to a level higher than C 12.
- Glass Cutting and Workshop Process Glazing to a level higher than C 12.

(32) Appendix 4, Architectural Aluminium Fabrication Classification – Clause 2 Definitions: Delete Wage Group C 10, Architectural Aluminium Fabrication Employee paragraph 5 and insert in lieu thereof the following:

5. Performs work under general supervision either individually or in a team environment.

Indicative tasks which an employee at this level may perform are as follows:

- Approves and passes first off samples and maintains quality of product across all areas of aluminium fabrication workshop;
- Works from basic production drawings, prints or plans;
- Operates, sets up and adjusts all production machinery in a plant including production process welding to the extent of training;
- Can perform a range of engineering maintenance functions including:
  - Removing equipment fastenings including use of destructive cutting equipment.
  - Lubrication of production equipment.
  - Running adjustments to production equipment.
- Operate all lifting equipment;
- Basic production scheduling and materials handling within the scope of the production process or directly related functions within raw materials/finished goods locations in conjunction with technicians;
- Understands computer techniques as they relate to production process operation;
- High level of stores and inventory responsibility beyond the requirements of an employee at C 11;
- Assists in the provision of on-the-job training in conjunction with tradespersons and trainers;
- Has a sound knowledge of the employer's operations as it relates to the production process;
- Can select, prepare and assemble all products in the workshop.

(33) Appendix 4, Architectural Aluminium Fabrication Classification - Clause 3 Wages: Delete Clause 3. Wages and insert in lieu thereof the following:

3 . - WAGES

Rates of pay for each classification level shall be that specified for corresponding wage level specified in Clause 4.8 - Wages and Supplementary Payments of this Award.

2022 WAIRC 00023

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	ALBANY TV SERVICES AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	MONDAY, 24 JANUARY 2022
FILE NO/S	APPL 41 OF 2021
CITATION NO.	2022 WAIRC 00023

Result	Award varied
Representation	
Applicant	Ms B Ward
Respondents	No appearance

Order

WHEREAS this is an application filed by the Electrical Trades Union WA on 15 November 2021 to vary the *Radio and Television Employees' Award* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (IR Act);

AND WHEREAS the grounds for the application are to update the allowances contained in the Award by the respective percentage increases determined by the State Wage Case decisions 2016 to 2021 and CPI as follows:

(a) The allowances contained in clauses 29(2) Leading Hand Allowance and 29(5) Tool Allowance by the increases effected by the State Wage Case decisions 2016 to 2021 in accordance with Principle 6.4 of the Statement of Principles. These allowances were last varied on 5 November 2015 ([2015] WAIRC 01002; (2015) 95 WAIG 1844);

(b) The meal allowance in clause 9 Overtime by the relevant CPI increases from June 2015 to June 2021. These allowances were last varied on 5 November 2015 ([2015] WAIRC 01002; (2015) 95 WAIG 1844);

(c) The travel allowances and car allowances in clauses 13 and 14 by the relevant CPI increases from March 2014 to June 2021. These allowances were last varied on 9 December 2014 ([2014] WAIRC 01342; (2014) 94 WAIG 1896);

AND WHEREAS Principle 6.1 of the Statement of Principles made in the 2021 State Wage Case states "Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of those expenses.";

AND WHEREAS Principle 6.3 of the Statement of Principles made in the 2021 State Wage Case states that "Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order, or, if an award contains another method for adjusting such allowances, in accordance with that other method.";

AND WHEREAS the proposed amendments are set out in Schedule B to the application. The methodology applied is set out in Schedule C to the application;

AND WHEREAS the ETU is the only named party to the Award;

AND WHEREAS there are 10 respondents listed in the First Schedule to the Award, of whom those who are currently in existence have been duly served with notice of the application and none have responded to the notice given to them of this application. The variations are therefore unopposed;

AND BEING satisfied that:

(a) The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation;

(b) The application is not made within a term specified in the Award; and

(c) The requirements for varying the Award are met;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the IR Act, hereby orders –

1. THAT the *Radio and Television Employees' Award* be varied in accordance with the attached Schedule and that the variations in the attached Schedule shall have effect from the beginning of the first pay period commencing on or after 1 January 2022.

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

SCHEDULE

1. Clause 9. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $14.50 or a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $9.80 for each meal so required.

2. Clause 13. - Car Allowances: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

	MOTOR CAR		
Area and Details	**Engine Displacement (in Cubic Centimetres)**		
	Over 2600cc	**Over 1600cc - 2600cc**	**1600cc & Under**
Rate per Kilometre (Cents)			
Metropolitan Area	88.2	78.8	68.6
South West Land Division	90.2	80.7	70.1
North of 23.5° South Latitude	99.0	88.8	77.5
Rest of the State	93.0	83.4	72.8
Motor Cycle (In All Areas)	30.2 cents per kilometre		

3. Clause 14. - Distant Work: Delete subclause (4) of this Clause and insert in lieu thereof the following:

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $16.50 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. - Wages:

A. Delete subclause (2) of this Clause and insert in lieu thereof:

(2) Leading Hands:

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	35.40
(b)	If placed in charge of more than ten and not more than twenty other employees	53.90
(c)	If placed in charge of more than twenty other employees	69.70

B. Delete subclause (5) of this Clause and insert in lieu thereof:

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $19.40 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $19.40 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause, for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through their negligence.

INDUSTRIAL MAGISTRATE—Claims before—

2022 WAIRC 00016

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2022 WAIRC 00016
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 3 NOVEMBER 2021
DELIVERED	:	WEDNESDAY, 19 JANUARY 2022
FILE NO.	:	M 51 OF 2021
BETWEEN	:	ALAN MAHON

CLAIMANT

AND

B. K ELSEGOOD & D.S ELSEGOOD & D.K ELSEGOOD & ELSEGOOD HOLDINGS PTY LTD & S.M ELSEGOOD & FALCONCREST HOLDINGS PTY LTD

RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Claim for severance pay – Interpretation of redundancy clause in award – Whether, to avoid liability to pay severance pay, sufficient for employer to say it 'wished' for someone to carry out employee's duties
Legislation	:	*Industrial Relations Act 1979* (WA) *Taxation Administration Act 1953* (Cth) *Magistrates Court (Civil Proceedings) Act 2004* (WA)
Instruments	:	General Order [2005] WAIRC 01715
Case(s) referred to in reasons:	:	***Quality Bakers of Australia v Goulding*** (1995) 60 IR 327 ***Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Buktenica*** [2006] WAIRC 04110 ***Jones v Department of Energy and Minerals*** (1995) 60 IR 304 ***Bampton v Viterra Limited*** [2015] SASCFC 87 ***Short v FW Hercus Pty Limited*** (1993) 40 FCR 511 ***R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd*** (1977) 16 SASR 6 ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828 ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638
Result	:	Claim is proven
Representation:		
Claimant	:	Mr P. Mullally (agent) from Workclaims Australia
Respondent	:	Mr G. McCorry (agent)

REASONS FOR DECISION

1 The Claimant, Alan Mahon (Mr Mahon) was employed by the Respondent as Chief Executive Officer (CEO) of Combined Metal Industries (CMI), the Respondent's steel product manufacturing business.

2 Mr Mahon commenced in the role of CEO at CMI on 1 June 2015.

3 On 23 March 2020, the Respondent terminated Mr Mahon's employment with CMI.

4 Mr Mahon's claim, brought pursuant to s 83(1) of the *Industrial Relations Act 1979* (WA), alleges a contravention of cl 4.4 of the General Order [2005] WAIRC 01715 (the Instrument), read in conjunction with cl 4.1 of the Instrument.

5 Specifically, the claim is for payment of the sum of $38,461.54 in severance pay, on the basis that the termination of Mr Mahon's employment was due to redundancy.

6 The Respondent accepts that Mr Mahon was employed as CEO from 1 June 2015, and that it terminated his employment on 23 March 2020, but maintains that it had no obligation to pay a severance payment because the termination was not due to redundancy.

7 The Respondent accepts that if I find in favour of the Claimant, the quantum of his claim is the correct amount payable.

8 This claim came on for trial before me on 3 November 2021.

9 At trial, Mr Mahon relied upon his statement dated 28 September 2021 as his evidence in chief. He was subject to brief cross-examination.

10 No additional evidence was called or tendered on behalf of the Claimant.

11 For the Respondent, Mr Darren Elsegood (Mr Elsegood), who is a managing partner of the Respondent, relied upon his statement dated 4 October 2021 as his evidence in chief, and he too was subject to brief cross-examination.

12 No additional evidence was called or tendered on behalf of the Respondent.

13 The parties agreed that I should disregard the statement of Mr Lloyd Douglas (Mr Douglas), which had been filed on behalf of the Respondent, and I do so.

The Evidence

14 There is little to no dispute as to the events that led to the termination of Mr Mahon's employment with CMI.

15 Based on the statements which were tendered in evidence and the cross-examination of the witnesses, I make the following findings on the balance of probabilities.

16 In March 2020, CMI was in a difficult financial position.

17 On the morning of 23 March 2020, Mr Douglas and Mr Elsegood had a meeting with Mr Mahon in Mr Mahon's office.

18 Prior to their arrival, Mr Douglas and Mr Elsegood had given Mr Mahon no notice of the meeting.

19 During this meeting, Mr Douglas asked why Mr Mahon had not responded to Mr Elsegood's request for him to accept a reduction in pay. Mr Mahon expressed surprise at this, as he had not received any request from Mr Elsegood to accept a reduction in pay.

20 Although, there was some discrepancy in the evidence on the issue of Mr Mahon being retained conditional upon a reduction in pay, I accept that at the meeting, Mr Douglas and Mr Elsegood put to Mr Mahon twice that he should accept a reduction in pay, but Mr Mahon rejected this proposal.

21 Mr Douglas then said it would be better if Mr Mahon resigned.

22 Mr Mahon said he did not wish to resign, but nor would he accept a reduction in pay.

23 Mr Douglas and Mr Elsegood reiterated that as the business could no longer afford Mr Mahon's remuneration, and as he would not accept a reduction in remuneration, his employment would be terminated.

24 Later the same day, a termination letter was emailed to Mr Mahon. The letter confirmed that Mr Mahon's employment had been terminated, effective 23 March 2020, and contained the following reasons for the termination:

(a) The business was unable to afford Mr Mahon's remuneration; and

(b) He had refused to take a 'lesser wage'.

25 Mr Mahon left CMI the same day and no severance pay was paid to him.

26 After Mr Mahon's departure from the business, Mr Elsegood took over his duties, with some assistance from an outside consultancy.

27 After Mr Mahon's departure, there was no person in the business who held the title of CEO, until August 2021.

The Instrument

28 There is no dispute that the Instrument was applicable to the employment relationship between the parties.

29 Clause 4.1 of the Instrument provides:

> *4.1 Definition*
>
> *Business includes trade, process, business or occupation and includes part of any such business.*
>
> *Redundancy occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.*
>
> *Transmission includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and 'transmitted' has a corresponding meaning.*
>
> *Weeks' pay means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:*
>
> *(a) overtime;*
>
> *(b) penalty rates;*
>
> *(c) disability allowances;*
>
> *(d) shift allowances;*
>
> *(e) special rates;*
>
> *(f) fares and travelling time allowances;*
>
> *(g) bonuses; and*
>
> *(h) any other ancillary payments of a like nature.*

30 Clause 4.4(a) of the Instrument provides that severance pay must be paid to an employee whose employment is terminated by reason of redundancy.

31 At issue is whether the termination of the Claimant's employment can be properly regarded as redundancy in the sense that, on 23 March 2020 the Respondent had made a definite decision that it no longer wished the job the Claimant had been doing to be done by anyone.

32 The Respondent argues that because the components of Mr Mahon's role as CEO continued to be performed after his departure from CMI, this demonstrates that it did wish the job Mr Mahon had been doing to be done, and that it was, therefore, not liable to give Mr Mahon severance pay.

33 Further, the Respondent rejects any construction of cl 4.1 which goes beyond the natural meaning of the words of the clause.

The Law

34 There exists a large body of case law which deals with what constitutes a redundancy, where the term 'redundancy' is not defined in an award or contract. It is clear from the cases that redundancy can arise in a multitude of circumstances.

35 For example, in ***Quality Bakers of Australia v Goulding***[1] Beazley J said:

> *A redundancy will arise where an employer has labour in excess of the requirements of the business; where the employer no longer wishes to have a particular job performed; or where the employer wishes to amalgamate jobs:* ***R v Industrial Commission of South Australia; Ex Parte Adelaide Milk Supply Co-Operative Ltd*** *(1977) 44 SAIR 1202 per Bray CJ at 1205;* ***Gromark Packaging v FMWU*** *(1992) 46 IR 98, per Franklyn J at 105. It is not necessary for the work to have disappeared altogether. As was said in* ***Bunnetts' Case [Bunnett v Henderson's Federal Spring Works Pty Ltd]*** *(1989) AILR 356:*
>
> > *Organisational restructuring may result in a position being abolished and the functions or some of them being given to another or split amongst others.*[2]

36 In ***Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Buktenica***,[3] the Full Bench of the Western Australian Industrial Relation Commission noted that:

> *As stated by Beazley J in* Quality Bakers *..., it is not necessary for the work which an employee was doing to have disappeared. What is required for a redundancy is that the employer no longer wishes anybody to be engaged to fulfil the position previously occupied; meaning the functions, duties and responsibilities of that position.*[4]

37 Additionally, in ***Jones v Department of Energy and Minerals***,[5] Ryan J said:

> [I]*t is within the employer's prerogative to rearrange the organizational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. It is inappropriate now to attempt an exhaustive description of the methods by which a reorganization of that kind may be achieved. One illustration of it occurs when the duties of a single, full-time, employee are redistributed to several part-time employees. What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organization, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant in the sense in which the word was used in the Adelaide Milk Co-operative case.*[6]

38 The question arises whether the general principles distilled from the cases mentioned above are directly applicable to a case (such as the case between the parties) in which 'redundancy' is defined, or whether a particular approach to construction of a defined term leads to a different conclusion.

39 To determine the answer to that question I have had regard to the case of ***Bampton v Viterra Limited***[7] (***Bampton***), in which the Full Court of the Supreme Court of South Australia considered the question of redundancy in the context of a redundancy policy clause that was in very similar terms to cl 4.1 of the Instrument. In doing so, I take careful note of Blue J's observation in that case that:

> *The construction of a contractual or statutory provision involves consideration of the text, context, evident purpose and fairness of the provision. Caution is required in having regard to the construction of the word 'redundant' in other cases addressing other agreements in other circumstances because the text, context and evident purpose will never be identical. Nevertheless, there is utility in having regard to authorities addressing the meaning of the word redundant when there is sufficient similarity with the text, context and evident purpose.*[8] (footnotes omitted)

40 In ***Bampton***, the relevant clause in the policy, which was accepted to form a term of the claimant's employment contract, provided as follows:

> *An Employee's position is redundant where the Company has made a definite decision that it no longer requires the job an Employee has been doing, be done by anyone (and this is not due to the ordinary and customary turnover of labour) and that decision leads to termination of the Employee's employment.*

41 In my view, there is sufficient similarity between the text, context and evident purpose of that clause and the one under consideration in the case before me, such that it is both useful and appropriate for me to have regard to the discussion in ***Bampton***.

42 It will be noted that Viterra Limited's clause referred both to 'an Employee's position' and to 'the job an Employee has been doing'. In its submissions to the Court, Viterra Limited sought to ascribe different meanings to 'position' and 'job', thus:

> *... Viterra contended that an 'employee's position' is the totality of the service by that employee but that 'the job an employee has been doing' is any one or more of the particular duties which comprise that service.*[9]

43 Rejecting Viterra Limited's construction of the clause, Kourakis CJ observed:

> *On Viterra's construction* [of the redundancy clause] *the termination of a long serving senior executive after devolving his or her responsibilities to several junior employees is not a redundancy because the 'job' is still being performed by others. That construction eviscerates the manifest purpose of Viterra's redundancy provision. It is to be observed in this respect that in its second decision in the* Termination, Change and Redundancy Case *the Australian Conciliation and Arbitration Commission did not exclude reclassifications from the scope of redundancy provisions. A construction which attempts to salvage some work for it to do depending on the extent to which the devolved duties approximate the dismissed employee's former position gives the clause an arbitrary and uncertain operation.*[10] (footnotes omitted)

44 The Instrument in the case before me refers only to an employee's 'job', and not 'position'; in that sense it is different from the clause under consideration in ***Bampton***. However, in light of Kourakis CJ's rejection of Viterra Limited's attempt to distinguish the two terms, I consider that his Honour's construction of that clause is equally applicable to the definition of 'redundancy' found in cl 4.1 of the Instrument.

45 Blue J, with whom Vanstone J agreed, outlined the historical origin of the text in Viterra Limited's redundancy policy.[11] One of the cases referred to in that outline is the case of ***Short v FW Hercus Pty Limited***[12] (***FW Hercus***), in which the Full Court of the Federal Court of Australia considered the redundancy provisions of the *Metal Industry Award 1984*. In circumstances that echo the factual scenario of the case before me:

> *Mr Short was one of two employees who performed drafting work together with Mr Hercus. Mr Short was dismissed by the company due to a downturn in trade. Drafting work thereafter was performed by the remaining draftsman and Mr Hercus. Mr Short claimed severance pay under the award. The company denied entitlement on the ground that it did not 'wish' Mr Short's job no longer to be done and this was forced on it by external economic circumstances. The Full Court rejected the company's argument. Burchett J (with whom Drummond J agreed) said:*
>
> > *The clause… is concerned with the fact of the change brought about by the making of a decision in circumstances unrelated to the ordinary and customary turnover of labour. The wide spectrum of technological and economic reasons for the decision is restricted only by the exclusion referring to the ordinary and customary turnover of labour.… The clause simply postulates the cessation of the employers wish to have the particular job done by anyone. That may be because some delightful alternative has enticed the employer; because the job has just come to an end; because of the employer's insolvency; or for any one of a number of other reasons.*
> >
> > *…*
> >
> > *The starting point may be taken to be the decision of the Full Court of the Supreme Court of South Australia in R v The Industrial Commission of South Australia; Ex Parte Adelaide Milk Supply Co-Operative Ltd and Others… Here the expression containing the words no longer wishes was first composed. <u>In its original setting, it is plain that it was not meant to convey the limitation for which the respondent contends</u>. On the contrary, it was meant to capture the full breadth of the concept elaborated by Bright J referred to in the passage quoted by Mitchell J.*[13] (emphasis added)

46 In ***R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd***,[14] Bray CJ drew a distinction between the redundancy of a position and dismissal arising out of a position being made redundant. His Honour said:

> [T]*he concept of redundancy in the context we are discussing seems to be simply this, that a job becomes redundant when the employer no longer desires to have it performed by anyone. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him, but because the employer no longer wishes the job the employee has been doing to be done by anyone.*[15]

<u>Application Of The Law To The Facts</u>

47 As to the following points I do not understand the Respondent to make any argument to the contrary, but for clarity I state:

(a) Mr Mahon's employment was not terminated due to serious misconduct or 'on account of any personal act or default … or any consideration peculiar to him'.

(b) The Respondent terminated Mr Mahon's employment because it could no longer afford his remuneration.

(c) Although the Respondent offered to retain Mr Mahon as CEO on a lower salary, and although Mr Elsegood and Mr Douglas were somewhat surprised when he rejected that offer, there was no obligation upon Mr Mahon to accept that lower salary. That was so, even though he had accepted lower remuneration for a period of approximately nine months in 2016 - 2017.

48 The fact that the Respondent was willing to pay Mr Mahon a lower salary in order to retain him as CEO does not mean that the subsequent (and swift) termination of his employment, when he declined to accept lower remuneration, was not due to redundancy.

49 In circumstances very similar to those that befell the respondent employer in the case of ***FW Hercus***, the Respondent was constrained by 'external economic circumstances' to terminate the employment of their CEO, Mr Mahon. As FW Hercus did when putting its case, the Respondent argues that the termination of Mr Mahon's employment did not constitute redundancy as that term is defined by the Instrument, because in fact it did 'wish' the job Mr Mahon had been doing to continue to be done. But, as pointed out in ***FW Hercus***, 'The [redundancy] clause does not say that the employer must be happy about his decision; only that he must have made it'.

50 Further, the cases establish that, after an employee's employment has been terminated, parsing the employee's job into its component parts and demonstrating that those tasks are still being carried out by others within the employer's business is not sufficient to avoid an obligation to pay severance pay. Rather, what matters is whether there are any duties left for the employee to perform.

51 At paragraph six of their submissions, the Respondent seeks to distinguish this case from others in which successful redundancy claims have been made, where the tasks previously performed by the Claimant employee have been taken over by several employees. The Respondent points out that in this case, Mr Mahon's duties and tasks were taken over only by Mr Elsegood, with some assistance from a consultant.

52 As to that submission, I return to the observations of Ryan J in ***Jones v Department of Energy and Minerals***,[16] in which his Honour made it clear that there was no exhaustive description of the methods by which a reorganisation might be achieved. His Honour said that <u>one</u> illustration of it occurs 'when the duties of a single, full-time, employee are redistributed to several part-time employees'; but that, in any event, '[i]f there is no longer any function or duty to be performed by that person, his or her position becomes redundant in the sense in which the word was used in the *Adelaide Milk Co-operative* case'.[17]

53 There is no evidence that in March 2020 the Respondent was implementing a carefully planned overhaul or restructure of CMI. Nonetheless, the difficult financial position in which it found itself at that time led to a reorganisation of sorts, and specifically to the termination of Mr Mahon's employment when he declined to accept a reduction in pay.

54 Aside from the meeting attended by Mr Elsegood, Mr Douglas and Mr Mahon on 23 March 2020, there was no attempt to find any solution to the predicament. As Mr Elsegood accepted during cross examination at trial, there had been no prior discussion with Mr Mahon about termination of his employment, and yet, the Respondent had clearly taken a view that either Mr Mahon had to accept a reduction in salary, or his employment would be terminated.

55 I accept Mr Mahon's evidence that at the meeting, he requested Mr Elsegood repeatedly for a proposal about salary in writing, but this was never forthcoming. I also accept his evidence that it was not evident at the meeting that the Respondent wanted to keep him employed.

56 Further, on the basis of the materials and the evidence of Mr Elsegood at trial, I find that the Respondent did not even attempt to put any proposal around salary in writing to Mr Mahon. In my view, even if Mr Mahon had not asked for this to be done, it should have been.

57 All of this leads me to draw an irresistible inference that as at 23 March 2020 there was no longer any function or duty to be performed by Mr Mahon, and the Respondent had decided that it no longer wished the job Mr Mahon had been doing to be done by anyone. This is further supported by the fact that no person then held the position of CEO until August 2021.

58 As an aside, in my view there must be some doubt as to whether the Respondent properly complied with cl 4.2 of the Instrument, which concerns consultation before terminations. However, the claim is not brought on that basis, and I make no specific finding with respect to that matter.

59 On careful consideration of the facts of this case, and by reference to the cases on interpretation of redundancy clauses almost identical to that under consideration here, I conclude that the termination of Mr Mahon's employment was by reason of redundancy as that term is defined in the Instrument.

Findings

60 The Respondent failed to comply with cl 4.4 of the Instrument.

61 The Respondent is liable to pay severance pay to the Claimant.

Orders

62 Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), the Respondent shall pay to Mr Mahon $38,461.54 in severance pay pursuant to cl 4.1 and cl 4.4 of the Instrument, within 30 days of the date of this order.

63 I will hear further submissions from the parties in respect to the claim for interest and the claim for a penalty.

E. O'DONNELL
INDUSTRIAL MAGISTRATE

---

[1] (1995) 60 IR 327.

[2] ***Quality Bakers of Australia v Goulding*** (1995) 60 IR 327, 332 - 333.

[3] [2006] WAIRC 04110.

[4] ***Sealanes (1985) Pty Ltd v John Francis Foley and John Anthony Buktenica*** [2006] WAIRC 04110 [30].

[5] (1995) 60 IR 304.

[6] ***Jones v Department of Energy and Minerals*** (1995) 60 IR 304, 308.

[7] [2015] SASCFC 87.

[8] ***Bampton*** [206].

[9] ***Bampton*** [40].

[10] ***Bampton***, [44].

[11] ***Bampton*** [189].

[12] (1993) 40 FCR 511.

[13] ***Bampton*** [195].

[14] (1977) 16 SASR 6.

[15] ***R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Ltd*** (1977) 16 SASR 6, 8.

[16] (1995) 60 IR 304.

[17] ***Jones v Department of Energy and Minerals*** (1995) 60 IR 304.

Schedule I – Jurisdiction of the Western Australian Industrial Magistrates Court

[1] The Western Australian Industrial Magistrates Court (IMC) has the jurisdiction conferred by the *Industrial Relations Act 1979* (WA) (IR Act) and other legislation. Section 83 and s 83A of the IR Act confer jurisdiction on the Court to make orders for the enforcement of a provision of an industrial agreement where a person has contravened or failed to comply with the agreement. If the contravention or failure to comply is proved, the IMC may issue a caution or impose a penalty and make any other order, including an interim order, necessary for the purpose of preventing any further contravention. The IMC must order the payment of any unpaid entitlements due under an industrial agreement.

[2] The powers, practice and procedure of the IMC are the same as in a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA). The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. The IMC is not bound by the rules of evidence and may inform itself on any

matter and in any manner as it thinks fit. In ***Sammut v AVM Holdings Pty Ltd [No 2]*** [2012] WASC 27 [40] - [47], Commissioner Sleight examined a similarly worded provision regulating cases in the State Administrative Tribunal of Western Australia, noting:

> [T]*he rules of evidence are* [not] *to be ignored … After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth …*
>
> *The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.*

Schedule II – Relevant Principles of Construction

[1] This case involves construing industrial agreements and statutes. Similar principles apply to both. The relevant principles to be applied when interpreting an industrial instrument are set out by the Full Bench of the Western Australian Industrial Relations Commission in ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828 [21] - [23]. In summary (omitting citations), the Full Bench stated:

(a) '*The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement*';

(b) '[T]*he primary duty of the court in construing an instrument is to endeavour to discover the intention of the parties as embodied in the words they have used in the instrument.* [I]*t is the objectively ascertained intention of the parties, as it is expressed in the instrument, that matters; not the parties' subjective intentions. The meaning of the terms of an instrument is to be determined by what a reasonable person would have understood the terms to mean*';

(c) '[T]*he objectively ascertained purpose and objective of the transaction that is the subject of a commercial instrument may be taken into account in construing that instrument. This may invite attention to the genesis of the transaction, its background and context.* [T]*he apparent purpose or object of the relevant transaction can be inferred from the express and implied terms of the instrument, and from any admissible evidence of surrounding circumstances*';

(d) '[A]*n instrument should be construed so as to avoid it making commercial nonsense or giving rise to commercial inconvenience. However, it must be borne in mind that business common sense may be a topic on which minds may differ*';

(e) '[A]*n instrument should be construed as a whole. A construction that makes the various parts of an instrument harmonious is preferable. If possible, each part of an instrument should be construed so as to have some operation*'; and

(f) '*Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect*'.

The following is also relevant:

(g) Ascertaining the intention of the parties begins with a consideration of the ordinary meaning of the words of the instrument. Ascertaining the ordinary meaning of the words requires attention to the context and purpose of the clause being construed: ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 [53] - [57] (French J) (***City of Wanneroo***).

(h) Context may appear from the text of the instrument taken as a whole, its arrangement and the place of the provision under construction. The context includes the history of the instrument and the legal background against which the instrument was made and in which it was to operate: ***City of Wanneroo*** [53] - [57] (French J); ***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*** [2013] FCA 638 [28] - [30] (Katzmann J).

PRISONS ACT 1981—APPEAL—Matters pertaining to—

2022 WAIRC 00050

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2022 WAIRC 00050
CORAM	**:**	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T B WALKINGTON
HEARD	**:**	FRIDAY, 8 OCTOBER 2021
DELIVERED	**:**	TUESDAY, 8 FEBRUARY 2022
FILE NO.	**:**	APPL 63 OF 2020
BETWEEN	**:**	TIMOTHY JAY EILIF FRANTZEN Appellant AND DIRECTOR-GENERAL DEPARTMENT OF JUSTICE Respondent

Catchwords	:	Industrial law (WA) - Removal of prison officer - Appeal against removal - Loss of confidence by respondent - Proper name of respondent - Relevant principles to apply to the appeal - Principles applied - Appeal dismissed
Legislation	:	*Police Act 1892* (WA)
		Prisons Act 1981 (WA) s 13, s 13(1), s 13(3), s 101(a), s 101(b), s 101(c), s 102(1), s 104(1), 104(2), s 106, s 106(1), s 106(2), s 107(4)(a), s 107(4)(b), s 108
		Prisons (Officers Drug and Alcohol Testing) Regulations 2016 (WA) reg 24
		Public Sector Management Act 1994 (WA)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	In person
Respondent	:	Mr S Pack of counsel

Case(s) referred to in reasons:

Adib Abdennabi v The Commissioner of Police WA Police [2020] WAIRC 00859; (2020) 100 WAIG 1464

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

Hawthorn v Minister for Corrective Services [2019] WAIRC 00302; (2019) 99 WAIG 1542

Lee v Western Australia Police Force [2021] WAIRC 00481; (2021) 101 WAIG 1294

McGrath v Commissioner of Police [2005] WAIRC 01989; (2005) 85 WAIG 2006

Polizzi v Commissioner of Police [2014] WAIRC 00302; (2014) 94 WAIG 477

Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

THE COMMISSION:

Background

1 The appellant was engaged as a prison officer under s 13 of the *Prisons Act 1981* (WA). At the time of the events relevant to these proceedings, the appellant was based at Hakea Prison. On 18 July 2020, whilst on duty, the appellant was the subject of a targeted drug test. The targeted drug test was authorised in accordance with the *Prisons (Officers Drug and Alcohol Testing) Regulations 2016* (WA). A urine sample, obtained from the appellant, returned a presumptive positive result for methamphetamine and amphetamine.

2 In accordance with the procedures specified in the *Regulations,* the appellant was provided an opportunity to explain the presumptive positive test result. In his interview with officers of the respondent, the appellant denied that he deliberately ingested methamphetamine or amphetamine. He did admit to being in the presence of a person who he suspected had been smoking methamphetamine, about three days prior to the drug test. The appellant also indicated during the interview that he thought that many prison officers associated with regular drug users.

3 The appellant's urine sample was the subject of laboratory testing. In a toxicology report prepared by Safework Laboratories dated 21 July 2020 (see pp 27-32 respondent's Bundle of Documents) the test result was confirmed as consistent with the ingestion of a standard dose of methamphetamine. It was estimated that the appellant's oral ingestion of methamphetamine occurred between 24 and 48 hours prior to the specimen being collected. Furthermore, the toxicology report concluded that the test result was not consistent with environmental or passive exposure to methamphetamine, nor with medications the appellant said he was taking at the time. The toxicology report indicated that the level of impairment of executive function of the appellant, given the level of methamphetamine detected, would be significant. Additionally, the report also concluded that the amphetamine/methamphetamine ratio in the test sample result for the appellant, being approximately 23.7%, was consistent with oral methamphetamine use.

4 As a result of the toxicology report and the interview with the appellant, the respondent commenced loss of confidence proceedings in accordance with s 102(1) of the *Prisons Act*. After considering the appellant's written response to the Notice of Loss of Confidence, the appellant was removed as a prison officer effective on 18 November 2020. The appellant now appeals against his removal under s 106 of the *Prisons Act*.

Reasons for removal

5 The reasons for the appellant's removal as a prison officer on the grounds of loss of confidence were set out in the respondent's Decision Notice dated 16 November 2020. The grounds for removal were as follows:

(a) **Ground 1** - There is significant inconsistency between your explanation of why you tested positive to amphetamine and methamphetamine and the opinion expressed in the toxicology report. The differences relate particularly to the timeframe you have provided for ingestion of the drugs and the environmental explanation

you have offered for your ingestion of the drugs. Your explanations lack credibility and cause me to form a suspicion that you are using illicit drugs yourself.

(b) **Ground 2** - There is significant inconsistency between your explanation of why you tested positive to amphetamine and methamphetamine and the opinion expressed in the toxicology report. The differences relate particularly to the timeframe you have provided for ingestion of the drugs and the environmental explanation you have offered for your ingestion of the drugs. Your explanations lack credibility and cause me to form the view that you have been dishonest in explaining the results of your drug test.

(c) **Ground 3** - You admit to socialising with associates outside the workplace who you believe are in possession of and use illicit drugs, including both the woman who was present in the room who you believe was smoking methamphetamine and, as I read your answer in the interview, you knew that your ex-partner used or uses methamphetamine as her 'drug of choice'.

(d) **Ground 4** - As a prison officer, you demonstrate a highly dismissive attitude towards your associations with drug users, saying "there's probably a lot of prison officers in here who know people who are using [methamphetamine]". This causes me to suspect that you are actively engaged in a lifestyle that is inextricably linked to illegal drug possession and use.

The appeal

6 The notice of appeal as filed contained no grounds of appeal. Rather, attached were various documents, including a copy of the respondent's Decision Notice in relation to the loss of confidence process, confirming the appellant's removal, which was dated 16 November 2020. Following directions from the Commission, the appellant filed a document described as 'Amended Grounds of Appeal'. In it, the appellant set out various bases as to why he contended that his removal as a prison officer was unfair and harsh.

7 The appellant contended that his removal was unfair because the drug testing undertaken by the respondent was performed incorrectly and with less scrutiny in comparison to drug testing conducted on a prisoner within a prison.

8 Secondly, the appellant maintained that his removal was harsh, on the grounds of the incorrect testing procedure. Furthermore, the appellant contended that the respondent erroneously made assumptions about his lifestyle and that his name has been 'slandered' throughout the prison staff. The appellant contended that he was not dishonest in explaining the results of his positive drug test result. Additionally, the appellant contended that he never stated that he socialised with persons using drugs. Rather, his comment was to the effect that drug usage is so common it is difficult to not be around people who do so at some point. The appellant also asserted that the respondent had no right to tell a prison officer what they may do in their private time and made various assertions that other prison officers consume illicit drugs.

9 The appellant also denied that he engaged in a lifestyle linked to illicit drug possession and usage, and the respondent has made assumptions about his lifestyle and behaviour, as a part of its decision to remove him. Finally, the appellant referred to the impact of his removal on himself and his family, due to his loss of income and the need to find other employment. The appellant contended that this added to the unfairness of his removal.

10 In this appeal, which is the first appeal of this kind under s 106 of the *Prisons Act*, two preliminary issues arise. The first issue is the proper name of the respondent. The second issue is the approach that the Commission should take to determining the appeal. We turn to the first issue now.

Proper name of the respondent

11 The named respondent is the 'Department of Justice'. At the outset of the proceedings, the Commission considered the name should be corrected to 'the Director-General, Department of Justice'. The reasons for this now follow.

12 A prison officer such as the appellant, is appointed by the responsible Minister under s 13(1) of the *Prisons Act.* Division 3 of Part X of the *Prisons Act* deals with the removal of prison officers due to a loss of confidence. By s 100(1)(a) to (c), the terms of Subdivision 2 are set out. It applies in circumstances where the Chief Executive Officer of the respondent does not have confidence in a prison officer's suitability to continue as a prison officer. The subdivision extends to circumstances where the Chief Executive Officer decides not to take or continue to take disciplinary action under the *Public Sector Management Act 1994* (WA) against a prison officer and takes removal action instead. However, in the case of a prison officer such as the appellant, engaged under s 13(1), the consent of the responsible Minister must be obtained to take removal action.

13 Under s 101(1), in the event that the Chief Executive Officer loses confidence in a prison officer, the Chief Executive Officer may take removal action. As noted immediately above, in the case of a prison officer engaged under s 13(1) of the *Prisons Act*, the power of the Chief Executive Officer is to recommend to the responsible Minister that the prison officer be removed. Under s 102, a notice of loss of confidence may be given by the Chief Executive Officer to a prison officer, which sets out the grounds of the Chief Executive Officer's loss of confidence. The prison officer may make a written submission in response to the Chief Executive Officer, following which the Chief Executive Officer is required to decide whether or not to take removal action. Notably too, under ss 104(1) and (2) of the *Prisons Act,* the Chief Executive Officer may withdraw the removal action or revoke the removal.

14 Under s 106(1), a prison officer may lodge an appeal to the Commission against the removal decision on the ground that the decision was harsh, oppressive, or unfair. The 'removal decision' is, by s 99, the decision of the Chief Executive Officer to take removal action. The notice of appeal is to be directed to the Chief Executive Officer under s 106(2). Importantly, and arguably conclusively, under s 106(5), it is provided that the *only* parties to the appeal are the prison officer and the Chief Executive Officer. Aside from the receival of, and acting on, a recommendation to remove a prison officer, the Minister plays no part in the removal process established under Division 3 of Part X of the *Prisons Act*. The Chief Executive Officer takes all of the steps that may be taken under these provisions in his own capacity, and not as a representative or delegate of the Minister.

15 Having regard to the preceding provisions of the *Prisons Act*, we conclude that the appropriate respondent for the purposes of appeals of the present kind is the 'Chief Executive Officer' as defined in s 3(1) of the *Prisons Act*, being the Chief Executive Officer of the Department of the Government principally assisting the Minister with the administration of the *Prisons Act*, that being the Department of Justice. In this case, the office undertaking these responsibilities is the Director-General. Accordingly, the proper named respondent is the 'Director-General, Department of Justice'.

Approach to the disposition of the appeal

16 The second preliminary issue arising is the approach that the Commission should take in determining appeals from loss of confidence removals under the *Prisons Act*. As set out in the respondent's written outline of submissions, the loss of confidence removal provisions in the *Prisons Act* were modelled on the loss of confidence and appeal provisions for police officers under the *Police Act 1892* (WA). In the Second Reading speech in Parliamentary debates in relation to the *Custodial Legislation (Officers Discipline) Amendment Bill 2013,* the then Minister for Corrective Services, in dealing with the loss of confidence process, said:

> The loss-of-confidence provisions in the bill mirror section 8 and part IIB of the Western Australian Police Act 1892. The introduction of these provisions will enable the Department of Corrective Services to assure the public that although its prison and custodial officers hold very special powers, these powers are matched by very special standards of integrity and accountability and the requirement to act in a way that is above reasonable suspicion and reproach. The introduction of loss-of-confidence powers will enable the Commissioner of Corrective Services to use a fair and straightforward process to promptly remove those very few officers whose incompetence, criminality, corruption or lack of integrity is such that he has lost confidence in their suitability to remain in office.
>
> (Hansard 20 November 2013 pp 6294 - 6296)

17 As noted above, the substantive amendments to the *Prisons Act* to introduce the loss of confidence and appeal provisions for prison officers are contained in Division 3 of Part X. The provisions dealing with the removal of prison officers are very similar to those for the removal of police officers. Likewise are the appeal provisions in Subdivision 3, setting out the right of appeal to the Commission, the proceedings on appeal, new evidence on an appeal and other matters. The provisions dealing with the decision of the Commission and remedies that may be granted on a finding of a harsh, oppressive, or unfair removal, are virtually the same as those under the *Police Act*.

18 In his submissions, the respondent has outlined the relevant tests applied by the Commission in relation to loss of confidence and appeal provisions for police officers under the *Police Act*. The overarching submission was that given the need for integrity, honesty, and competency required of prison officers under the comparable provisions of the *Prisons Act*, then the same approach should be adopted by the Commission in cases of the present kind, as is adopted in relation to police appeals. It was also submitted that the Chief Executive Officer of the Department of Justice, as the respondent, is in the same position as is the Commissioner of Police. The Chief Executive Officer has a statutory responsibility to manage, control and ensure the security of prisons and the safe custody and welfare of prisoners. In order to perform these functions, the respondent submitted that he needs to ensure that prisons are staffed by prison officers whose integrity, honesty, competence, performance, and conduct can be relied upon, and in whom the community can maintain trust and confidence. As with police officers, the respondent submitted that the standard of behaviour expected by the community for prison officers is also high.

19 Prison officers exercise significant statutory powers, including the use of force in relation to prisoners under their care and control in a prison: ***Hawthorn v Minister for Corrective Services*** [2019] WAIRC 00302; (2019) 99 WAIG 1542. In commenting on the nature of the responsibilities of prison officers, in ***Hawthorn***, Kenner SC (as he then was) said at [105]:

> It goes without saying in my view, that as with police officers, prison officers are in a position of trust. They are able to exercise substantial powers under the *Prisons Act*, including the use of force, in relation to prisoners under their supervision. They do so in an environment largely away from public scrutiny. Thus, the respondent, and the CEO under the *Prisons Act*, must be able to rely on the integrity and honesty of officers in the discharge of their duties. The respondent must be able to have a high level of trust and confidence in an officer.

20 In our view, given the nature of the work of prison officers in the community, and the responsibilities of the Chief Executive Officer under the *Prisons Act*, and the expectations of the community to require prison officers in this State to discharge their duties to a very high standard, it is only appropriate that the approach adopted by the Commission to appeals against removals of police officers under the *Police Act*, be adopted in proceedings of the present kind.

21 Ultimately, the test is whether, having regard to the circumstances of a particular case, and in the overall context of whether a removal is harsh, oppressive or unfair, it was open to the Chief Executive Officer to lose confidence in a prison officer by reason of their integrity, honesty, competence, performance, or conduct: ***Lee v Western Australia Police Force*** [2021] WAIRC 00481; (2021) 101 WAIG 1294 at [37] - [40], citing and applying the decision of the Commission in ***Carlyon v Commissioner of Police*** [2004] WAIRC 11966; (2004) 85 WAIG 708. Furthermore, we adopt and apply the approach taken to the application of the relevant statutory provisions in determining whether the removal of a police officer is harsh, oppressive, and unfair, in cases such as ***McGrath v Commissioner of Police*** [2005] WAIRC 01989; (2005) 85 WAIG 2006; ***Polizzi v Commissioner of Police*** [2014] WAIRC 00302; (2014) 94 WAIG 477; and ***Adib Abdennabi v The Commissioner of Police WA Police*** [2020] WAIRC 00859; (2020) 100 WAIG 1464.

22 As has been stated by the Commission in appeals against the removal of police officers, despite a loss of confidence by the Commissioner of Police, the removal of an officer may still be unfair, applying the test of industrial fairness in ***Undercliffe Nursing Home v The Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385. Importantly however, as was emphasized in ***Carlyon*** at [182] to [188], the industrial principle of a 'fair go all around', must be applied in the context of the relevant statutory provisions, especially the special nature of (in

that case), the relationship between the Commissioner of Police and a police officer. Likewise, in this case involving a prison officer, particular regard must be had to s 107(4)(b) of the *Prisons Act*.

23 Accordingly, the above approach will be adopted in the determination of this appeal.

Admission of new evidence

24 In accordance with s 108 of the *Prisons Act*, the Commission granted the appellant and respondent leave to tender new evidence by consent. The appellant's new evidence was a letter dated 17 April 2020 from Mr Keith Woods, a clinical psychologist, of Base Psychology, to Superintendent Hedges at the Eastern Goldfields Regional Prison. The second item of new evidence was a series of 'screenshots' in relation to drug test sampling procedures, taken from the internet. For the respondent, the new evidence consisted of witness statements of Nigel Mark Squirres, a Senior Investigator at the respondent; a witness statement of Victoria Baylem, the Principal Drug and Alcohol Testing Officer at the respondent; and a witness statement of Catherine Bennett, a Senior Drug and Alcohol Testing Officer employed by the respondent.

Consideration

Drug testing procedure

25 The procedure undertaken by the respondent in testing the appellant at Hakea Prison on 18 July 2020 was the subject of evidence by Ms Bennett and Mr Squirres. Ms Bennett has completed the Australian Quality Training Framework approved course in specimen collection for testing for drugs of abuse. She is a designated approved sample collector under the *Regulations*.

26 Ms Bennett said she attended at Hakea Prison in the company of Mr Squirres at a about 10.00 am on Saturday 18 July 2020. The purpose of the attendance at the prison was to conduct an authorised targeted drug test on the appellant. Both she and Mr Squirres spoke to the appellant and informed him that he was required to provide a urine sample for drug testing purposes under the *Regulations*. Ms Bennett said that the appellant agreed to the testing process and that he signed a form to this effect. A 'SureStep Urine Cup' was used by the appellant, from a sealed testing kit taken into the prison by Ms Bennett. The cup remained sealed in its plastic bag and was placed on the table in the meeting room where the appellant was present.

27 Mr Squirres said that prior to the test, he inspected the male toilet facilities where the appellant was to provide his sample. He cleaned the toilet and used 'toilet blue' in the toilet water, so that the water in the toilet bowl could not be used to dilute the test sample. Mr Squirres said that the appellant came into the meeting room and Ms Bennett explained the testing procedure. Mr Squirres then put on gloves and took the testing cup, still in its bag, to the toilet area with the appellant.

28 The appellant did not wear gloves and Mr Squirres said there was not a requirement for him to do so. The appellant washed his hands with soap and water. Mr Squirres unwrapped the testing cup and gave it to the appellant. The appellant entered the toilet in the view of Mr Squirres and gave a urine sample. Once the sample had been given, the appellant returned the sample cup to Mr Squirres who accompanied the appellant back to the meeting room.

29 Mr Squirres handed the sample cup to Ms Bennett, who said she saw it had a sample of urine in it. She activated the cup by removing the sticker on the device and inserting a key into the cup, which releases a portion of the sample into a separate chamber. Ms Bennett said this small chamber is separated from the main sample and there can be no contamination. Ms Bennett said that the sample test in the separate small chamber showed a presumptive positive test result for amphetamine and methamphetamine. She said that she showed the appellant the result and took a photo of it.

30 Once this was done, Ms Bennett then said she started the process to split the urine sample. This involved the use of two test tube like 'vacuettes' and a straw like device. First, Ms Bennett drew a sample from the main chamber of the cup into the first vacuette. The second vacuette was also filled. Chain of custody procedures were then completed. Ms Bennett said all of the above steps were done in accordance with the relevant Australian Standard, that being AS/NZS403:2008 *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*. The appellant witnessed Ms Bennett taking these steps and signed the relevant documents in relation to sample collection procedures and the chain of custody.

31 Ms Baylem explained the usual procedure for administering a random drug test of prison officers. Prior to being employed by the respondent, Ms Baylem worked for the Western Australian Police in a similar capacity and she is familiar with relevant testing procedures. Ms Baylem described the procedure to prepare the toilet for a test, as undertaken by Mr Squirres. Ms Baylem described the SureStep Urine Cup method of testing, and that whilst the prison officer must wash their hands, they are not required to wear gloves, which is consistent with the Australian Standard. The testing officer does wear gloves.

32 Ms Baylem then outlined the process for the initial test, followed by the splitting of the sample. Once the relevant forms are signed, the samples and the completed forms are then placed in a biohazard bag. Whilst Ms Baylem said she had no experience in conducting drug tests on prisoners, she understood that there may be some differences in procedure.

33 The appellant contended that the drug testing performed on him at Hakea Prison differed to the procedures used for tests on prisoners. For prisoners, this involves the person being tested wearing gloves and urinating into a cup. Urine is then poured into a test which is then activated. A further sample is then obtained from the cup and is sealed and sent to the laboratory for testing. The original test sample is then frozen. As noted above, the new evidence document relied upon by the appellant, tendered as exhibit A2, is seemingly an extract from a document on the internet from an organisation called 'Progressive Diagnostics'. In part, the appellant relied upon this to suggest that the urine specimen should be split into a 'test specimen' and a 'referee specimen'. Both are sealed in the presence of the donor. One specimen can be made available for independent laboratory testing if required.

34 We are not, to any extent, persuaded that the testing procedures undertaken by the respondent were unfair or non-compliant with the Australian Standard. The Australian Standard sets out procedures for the collection of urine samples, on site screening and the handing and dispatch of specimens for laboratory testing.

35 Contrary to the appellant's contentions, there is nothing in the Australian Standard to require the donor to wear gloves. Handwashing is required which occurred in this case. Secondly, there is no real difference between the SureStep Urine Cup process involving initial testing in a separate chamber, followed by the splitting of the sample into two vacuettes, which are then sealed and sent for testing and the process outlined by the appellant for testing prisoners. In any event, the SureStep Urine Cup procedure is plainly compliant with the Australian Standard. Appropriate chain of custody procedure was followed in this case, all in the presence of the appellant. The appellant signed the relevant specimen collection and chain of custody documents. These documents contained a declaration that the specimens accompanying the documents were his own and that those sent for further testing were sealed in his presence and the information contained on the chain of custody form was correct.

36 We therefore consider it was entirely reasonable for the respondent to rely upon the testing procedure and the test results in relation to the appellant's urine drug test at Hakea Prison, as it did in this case. The appellant has not established any flaw in the testing procedure such as to call into question the test results.

Appellant's associations and honesty

37 The appellant complained that the respondent, in its decision as to its loss of confidence in him and his removal as a prison officer, made assumptions in relation to his lifestyle that were not reasonably open. Furthermore, the appellant denied that he was dishonest when interviewed immediately after the drug test when responding to questions about his voluntary consumption of illegal drugs. The appellant also maintained in this context, that the respondent did not have the right to tell prison officers what they could and could not do in their own time away from the workplace. The appellant also maintained that his comments in the interview and in response to the Notice of Loss of Confidence, as to the prevalence of drugs in the community and that it was hard to not be around them at some time, were taken out of context and were unfairly used against him.

38 In the interview with the appellant immediately following the sample test presumptive positive result on 18 July 2020, Ms Bennett was exercising her powers under reg 24 of the *Regulations*. This deals with providing the appellant an opportunity to explain the positive drug test result. When asked whether he had any explanation for the positive result for amphetamine and methamphetamine, the appellant said that he did not. He could not dispute those drugs were in his system. In response to a question from Ms Bennett as to whether he had knowingly ingested the drugs, the appellant told Ms Bennett and Mr Squirres, that he did not do so 'on purpose'.

39 The appellant mentioned in the interview that on the prior Wednesday, 15 July 2020, he had visited the house of his former girlfriend. He went to a room where a woman was present who was 'smoking a pipe'. When asked what this meant, the appellant said he presumed from its appearance, it was 'probably meth' which was his former girlfriend's 'drug of choice'. The appellant said that he spent approximately 10 minutes in the room and did not take much notice of the woman. The appellant also commented in the interview to the effect that it was hard not to run into someone on a regular basis using this substance, given the number of people in the community using it.

40 As noted earlier in these reasons, the Safework Laboratories toxicology report prepared by Dr Tynan, dated 21 July 2020, noted a high level of amphetamine and methamphetamine in the test sample, 'consistent with the ingestion of a standard 30mg dose of methamphetamine'. Furthermore, such a result was inconsistent with external environmental contamination, as claimed by the appellant. Also, the ratio of the amphetamine to methamphetamine of approximately 23.7%, in the context of the methamphetamine concentration in the appellant's urine sample, was said in the report to be consistent with the recent ingestion of drugs prior to the sample collection. We note also that the report posited the view that given this ratio of amphetamine to methamphetamine, it was most likely less than 24 hours prior to the sample collection that ingestion of the drugs took place.

41 The conclusive toxicology report result is completely at odds with the appellant's denial he ingested illegal drugs at the material time. Importantly, the most likely time of ingestion, being less than 24 hours, or at the most, 48 hours prior to the test at Hakea Prison, is also quite at odds with the appellant's suggestion of environmental contamination. This is because, on his own case, he was present at his former girlfriend's house some two and a half days prior to the test. The toxicology report clearly indicated the likelihood of oral ingestion of amphetamine and methamphetamine in the days after his visit to his former girlfriend's house.

42 In view of this evidence, the inference was plainly open to be drawn that in his denials of illicit drug use to the respondent, the appellant was not being honest.

43 As to the challenge to the respondent's conclusions regarding the appellant's associations with persons possessing and using illicit drugs, taking all of what was before the respondent as a result of the notice of loss of confidence process, such a conclusion was reasonably open. The appellant's responses to these issues were somewhat cavalier. His admission of his former girlfriend being a user of methamphetamine; that given the prevalence of methamphetamine in the community it was hard not to encounter it; his view that it was not for the respondent to control what prison officers may do outside of working hours; and taken in conjunction with the appellant's own positive test result for amphetamine and methamphetamine, considered together, all point in the direction of a conclusion that the appellant had the associations contended by the respondent.

44 Therefore, we are not persuaded that the appellant has established that the respondent's conclusions in relation to these issues were not reasonably open.

Impact of removal on the appellant and his family

45 It is to be accepted that the removal of a prison officer from the prison service in this State will have a substantial impact on the officer concerned and his or her family. This is also the case for the removal of police officers under the *Police Act* and the dismissal of an employee at common law. All such cases will to a greater or lesser degree, involve a loss of income and cause some degree of stress.

46 In the present appeal, while the Commission is required to take into account the interests of the appellant under s 107(4)(a) of the *Prisons Act*, s 107(4)(b) requires the Commission to have regard to the public interest, in particular the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of prison officers. This is in the context of the special relationship between the Chief Executive Officer and prison officers generally.

47 Whilst exhibit A1, being the letter from Mr Woods, refers to some psychological health issues being experienced by the appellant, it seems that they related to a period of time predating the appellant's removal as a prison officer. It was not clear from this evidence, how the appellant maintained that it related to the removal itself and the consequences of such removal, for the appellant and his family.

Conclusions

48 In the circumstances of this matter, it was open to the Chief Executive Officer to lose confidence in the appellant by reason of his integrity, honesty, and conduct. For the foregoing reasons, we are not persuaded that, in applying the test set out earlier in these reasons, the appellant has established that his removal as a prison officer was harsh, oppressive, or unfair. Accordingly, the appeal is dismissed.

2022 WAIRC 00052

APPEAL AGAINST DECISION TO TAKE REMOVAL ACTION ON 16 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TIMOTHY JAY EILIF FRANTZEN
	APPELLANT
	-v-
	DIRECTOR-GENERAL DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 8 FEBRUARY 2022
FILE NO/S	APPL 63 OF 2020
CITATION NO.	2022 WAIRC 00052

Result	Appeal dismissed
Representation	
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 *Prisons Act 1981*, hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Chief Commissioner,

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2022 WAIRC 00021

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN HARLEY
	APPLICANT
	-v-
	WESTERN AUSTRALIA'S LAND INFORMATION AUTHORITY
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 21 JANUARY 2022
FILE NO/S	U 81 OF 2021
CITATION NO.	2022 WAIRC 00021

Result	Application dismissed
Representation	
Applicant	Mr B Harley on his own behalf
Respondent	Ms S Kemp of Counsel and Mr M Hayman

Order

HAVING heard from Mr B Harley on his own behalf and Ms S Kemp of Counsel and Mr M Hayman on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2022 WAIRC 00030

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN PRINGLE
	APPLICANT
	-v-
	BHP IRON ORE (JIMBLEBAR) PTY LTD EPA WESTERN AUSTRALIA
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 28 JANUARY 2022
FILE NO/S	U 3 OF 2022
CITATION NO.	2022 WAIRC 00030

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Ms R Lee

Order

HAVING heard from Ms R Lee of Counsel and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2022 WAIRC 00029

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIM SAMSA
	APPLICANT
	-v-
	BELLADIA UNIT TRUST, TRADING AS WIZARD PHARMACY JOONDALUP CENTRAL
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 28 JANUARY 2022
FILE NO/S	U 98 OF 2021
CITATION NO.	2022 WAIRC 00029

Result	Application dismissed
Representation	
Applicant	Ms K Samsa on her own behalf
Respondent	Ms A Ford

Order

HAVING heard from Ms K Samsa on her own behalf and Ms A Ford for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2022 WAIRC 00060

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2022 WAIRC 00060
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	FRIDAY, 4 FEBRUARY 2022
DELIVERED	**:**	THURSDAY, 10 FEBRUARY 2022
FILE NO.	**:**	B 76 OF 2021
BETWEEN	**:**	ROBIN JAMES INGRAM
		Applicant
		AND
		V P LOWE FREIGHT
		Respondent

CatchWords	**:**	Denied contractual benefits – Conciliation conference held and settlement agreement reached – application dismissed for want of prosecution
Legislation	**:**	*Industrial Relations Act 1979* (WA): s 27
		Industrial Relations Commission Regulations 2005 (WA): reg 25(3)
Result	**:**	Application dismissed for want of prosecution
Representation:		
Applicant	**:**	No appearance
Respondent	**:**	No appearance

Cases referred to in reasons:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project (2000) 80 WAIG 3162

Reasons for Decision (Ex Tempore)

1 Mr Ingram filed an application for denied contractual benefits.

2 A conciliation conference was held in this matter on 11 November 2021. At the conference, the parties reached an agreement to settle application B 76 of 2021 and all matters arising out of the employment relationship (**Settlement Agreement**). The terms of the Settlement Agreement were confirmed in an email sent by my Associate to the parties on 11 November 2021.

3 On 1 December 2021, my Associate emailed Mr Ingram and asked him to update the Commission about his application by 6 December 2021. Mr Ingram did not update the Commission.

4 On 8 December 2021, my Associate again emailed Mr Ingram and asked him to update the Commission about his application. Mr Ingram did not update the Commission.

5 On 20 December 2021, my Associate emailed Mr Ingram a third time, and asked him to update the Commission about his application. She also informed him that if he did not update the Commission by 23 December 2021, his application would be listed for a hearing to show cause why it should not be dismissed for want of prosecution. Mr Ingram did not update the Commission.

6 On 31 December 2021, the respondent emailed my Associate and confirmed that the respondent had complied with the Settlement Agreement. The respondent attached a receipt for payment of the settlement sum to Mr Ingram.

7 On 4 January 2022, my Associate telephoned Mr Ingram but he did not answer. She left a message asking him to call her back as soon as possible about his application.

8 My Associate telephoned Mr Ingram again on 5 January 2022, but Mr Ingram did not answer.

9 Mr Ingram's application was listed for a hearing to show cause on 4 February 2022. Accordingly, Mr Ingram was served with a notice of hearing, and informed by my Associate that if he did not attend the hearing and show cause why his application should not be dismissed, it would be dismissed for want of prosecution.

10 Mr Ingram did not appear at the show cause hearing.

The law

11 The Commission can dismiss a matter under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**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

12 In ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project*** (2000) 80 WAIG 3162 (**Barminco**), the Full Bench set out the principles to consider when deciding whether to dismiss an application for want of prosecution. They include the length of the delay, the explanation for the delay, the hardship to the applicant if the application is dismissed, the prejudice to the respondent if the action is allowed to proceed, and the conduct of the respondent in the litigation: ***Barminco*** (3162).

Consideration

13 The Commission has the power to proceed to hear and determine the matter in the absence of any party who has been duly served with notice of the proceedings: s 27(1)(d) of the IR Act. Service on Mr Ingram in this matter may be effected by leaving the notice at, or sending it by pre-paid post to, Mr Ingram's usual or last known place of abode: reg 24(2)(d) *Industrial Relations Commission Regulations 2005* (WA) (**IR Regulations**).

14 Alternatively, service can be effected on Mr Ingram by sending the notice of hearing as an attachment to an email sent to the email address that Mr Ingram has provided to the Commission: reg 25(3) of the IR Regulations.

15 In circumstances where my Associate:

(a) emailed the notice of hearing to the email address Mr Ingram provided to the Commission (and received a successful delivery receipt); and

(b) posted the notice of hearing to the postal address that Mr Ingram provided to the Commission,

I am satisfied that Mr Ingram has been duly served with notice of these proceedings and the Commission may proceed with the hearing in his absence.

16 Mr Ingram has not contacted the Commission since his conciliation conference on 11 November 2021, responded to the emails sent to him by my Associate or attended the show cause hearing on 4 February 2022.

17 I consider that:

(a) there has been a relatively long delay in the context of this application;

(b) there has been no explanation for that delay;

(c) there is no evidence of hardship to Mr Ingram if his application is dismissed; and

(d) there is nothing before the Commission to suggest the respondent's conduct in the matter has in any way contributed to Mr Ingram's failure to prosecute his application.

18 In the circumstances, I find that Mr Ingram has not prosecuted his application at the Commission. Further, I'm satisfied based on the respondent's email dated 31 December 2021, and the attached payment receipt, that the respondent has complied with the Settlement Agreement. It would not be in the public interest for Mr Ingram to be allowed to continue his application.

Conclusion

19 I will order that this application be dismissed under s 27(1)(a) of the IR Act.

2022 WAIRC 00045

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBIN JAMES INGRAM
	APPLICANT
	-v-
	V P LOWE FREIGHT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 FEBRUARY 2022
FILE NO/S	B 76 OF 2021
CITATION NO.	2022 WAIRC 00045

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 4 February 2022;

AND WHEREAS at the hearing on 4 February 2022 there was no appearance for or by the applicant and the Commission proceeded in the absence of the applicant;

AND HAVING given reasons for the decision during the hearing on 4 February 2022;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

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

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

PROCEDURAL DIRECTIONS AND ORDERS—

2022 WAIRC 00042

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDYL KEVIN TENNENT
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 3 FEBRUARY 2022
FILE NO/S	APPL 32 OF 2021
CITATION NO.	2022 WAIRC 00042

Result	Order issued
Representation	
Applicant	On his own behalf
Respondent	Mr L Geddes (of counsel)

Order

HAVING heard from the applicant on his own behalf and Mr L Geddes of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT the name of the respondent be amended to 'Minister for Corrective Services'.

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

2022 WAIRC 00043

REFERRAL TO COMMISSION UNDER PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDYL KEVIN TENNENT
	APPLICANT
	-v-
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	THURSDAY, 3 FEBRUARY 2022
FILE NO.	APPL 32 OF 2021
CITATION NO.	2022 WAIRC 00043

Result	Directions issued
Representation	
Applicant	On his own behalf
Respondent	Mr L Geddes (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr L Geddes of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 3 March 2022;
2. THAT the applicant file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 18 March 2022;
3. THAT the respondent file outlines of evidence and documents, other than the agreed documents, on which he intends to rely by 1 April 2022;
4. THAT the applicant file a written outline of submissions by 19 April 2022;
5. THAT the respondent file a written outline of submissions by 4 May 2022; and
6. THAT discovery be informal.

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

2022 WAIRC 00053

REFERRAL OF A MATTER UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES THOMAS WATERTON
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 8 FEBRUARY 2022
FILE NO.	APPL 42 OF 2021
CITATION NO.	2022 WAIRC 00053

Result	Programming directions issued
Representation	
Applicant	On his own behalf
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 1 March 2022;
2. THAT the applicant file outlines of evidence and documents (other than the agreed documents) on which he intends to rely by 16 March 2022;
3. THAT the respondent file outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 30 March 2022;
4. THAT the applicant file a written outline of submissions by 13 April 2022;
5. THAT the respondent file a written outline of submissions by 2 May 2022;
6. THAT discovery be informal; and
7. THAT the matter be listed for a 2-day hearing.

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

2022 WAIRC 00020

REVIEW OF DECISION OF THE CONSTRUCTION INDUSTRY LSL PAYMENTS BOARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CONTRA-FLOW PTY LTD
	APPLICANT
	-v-
	THE CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 21 JANUARY 2022
FILE NO/S	APPL 43 OF 2021
CITATION NO.	2022 WAIRC 00020

Result	Order issued
Representation	
Applicant	Mr R Lewis of Counsel
Respondent	Mr S Kemp of Counsel

Order

HAVING heard from Mr R Lewis of Counsel on behalf of the applicant and Mr S Kemp of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT the applicant file and serve a statement of any agreed facts also identifying
   (a) any material facts that are not agreed, and
   (b) the legal issues for determination
   by no later than 4 March 2022.
2. THAT the directions hearing be adjourned to Tuesday, 15 March 2022 at 2.15 pm for further directions.
3. THAT the parties have liberty to apply.

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

2022 WAIRC 00061

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA ALCOCK
	APPLICANT
	-v-
	PROFESSIONAL SEARCH GROUP PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	FRIDAY, 11 FEBRUARY 2022
FILE NO/S	B 82 OF 2021
CITATION NO.	2022 WAIRC 00061

Result	Application allowed to proceed
Representation	
Applicant	On her own behalf
Respondent	No appearance

Order

WHEREAS this is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) that was listed for a show cause hearing on 4 February 2022;

AND WHEREAS the applicant had not contacted the Commission since 14 December 2021, responded to the emails sent to her by the Commission's Associate nor complied with the direction dated 15 December 2021;

AND WHEREAS at the show cause hearing on 4 February 2022 the applicant confirmed that she wants to pursue her application and gave evidence that:

(a) the delay in progressing her application was because of the death of a family member, the applicant's ill health and the disruption caused by the applicant having to move house at short notice;
(b) the applicant would experience hardship if the application were dismissed because she has spent considerable time and energy preparing for her application to be heard and determined; and
(c) the respondent's conduct has not contributed to the applicant's delay in prosecuting her application.

AND WHEREAS the respondent did not wish to be heard about whether the application should be dismissed, including about whether there would be any prejudice to the respondent if the application were allowed to proceed;

AND WHEREAS the Commission considers that while the delay is relatively long, the applicant has a good reason for the delay and would experience hardship if her application were dismissed, and there is no evidence of any prejudice to the respondent if the application were allowed to proceed;

AND WHEREAS the Commission is satisfied, considering the principles set out in ***The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v Barminco Pty Ltd – Plutonic Project*** (2000) 80 WAIG 3162 at 3162, that application B 82 of 2021 should be allowed to proceed;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT this application B 82 of 2021 be allowed to proceed.

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

2022 WAIRC 00046

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN DOYLE
	APPELLANT
	-and-
	ROMAN CATHOLIC BISHOP OF BUNBURY
	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
DATE	FRIDAY, 4 FEBRUARY 2022
FILE NO/S	FBA 8 OF 2021
CITATION NO.	2022 WAIRC 00046

Result	Order issued
Appearances	
Appellant	In person
Respondent	Mr I Curlewis of counsel

Order

The Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT exhibits A1 to A13 and R1 to R3 inclusive and the transcript of proceedings dated 11 March 2021 in application B 167/2019, the subject of the herein appeal, be and are hereby incorporated into the Appeal Books.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2022 WAIRC 00034

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	TUESDAY, 1 FEBRUARY 2022
FILE NO.	OSHT 4 OF 2021
CITATION NO.	2022 WAIRC 00034

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 is to provide documents or materials requested by the other party by 25 February 2022, 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 25 February 2022;
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 17 May 2022;
5. THAT the respondent file and serve upon the applicant any witness statements or expert reports upon which it intends to rely by no later than 17 June 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.

2022 WAIRC 00035

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	TUESDAY, 1 FEBRUARY 2022
FILE NO.	OSHT 5 OF 2021
CITATION NO.	2022 WAIRC 00035

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 is to provide documents or materials requested by the other party by 25 February 2022, 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 25 February 2022;
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 17 May 2022;
5. THAT the respondent file and serve upon the applicant any witness statements or expert reports upon which it intends to rely by no later than 17 June 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.

2022 WAIRC 00033

APPEAL AGAINST THE DECISION TAKEN BY THE EMPLOYER ON 20 JANUARY 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERENCE REGINALD ROY
	APPELLANT
	-v-
	DEPARTMENT OF COMMUNITIES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
	MR G BROWN - BOARD MEMBER
	MR S DANE - BOARD MEMBER
DATE	MONDAY, 31 JANUARY 2022
FILE NO	PSAB 14 OF 2021
CITATION NO.	2022 WAIRC 00033

Result	Order issued
Representation	
Appellant	Ms S Kemp of Counsel
Respondent	Mr S Pack of Counsel

Order

WHEREAS this is an appeal made pursuant to s 80I(1)(a) of the *Industrial Relations Act 1979* (WA) (IR Act);

AND WHEREAS a directions hearing was scheduled to take place on Thursday, 3 February 2022 at 10.00 am;

AND WHEREAS on 28 January 2022, the appellant's representative wrote to the Public Service Appeal Board (Board), advising that the parties have conferred and agreed to consent orders to seek an adjournment of the directions hearing and attached a minute proposed of consent orders signed by both parties;

AND WHEREAS on 28 January 2022, the Board considered the correspondence and satisfied the circumstances warranted an adjournment;

NOW THEREFORE the Board, pursuant to the powers conferred under the IR Act, and by consent, hereby orders –

THAT the directions hearing listed for Thursday, 3 February 2022 at 10.00 am be adjourned and relisted on a date on or after Monday, 14 March 2022.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2022 WAIRC 00038

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 17 SEPTEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK ANDREW LUKAN
	APPELLANT
	-v-
	CONSTRUCTION TRAINING FUND
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER T EMMANUEL – CHAIRPERSON
	MR B HAWKINS – BOARD MEMBER
	MR M SALAMON – BOARD MEMBER
DATE	TUESDAY, 1 FEBRUARY 2022
FILE NO.	PSAB 21 OF 2021
CITATION NO.	2022 WAIRC 00038

Result	Programming directions issued
Representation	
Appellant	On his own behalf
Respondent	Mr R Andretich (of counsel)

Direction

HAVING heard from the appellant on his own behalf and Mr R Andretich (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), directs –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 18 February 2022;
2. THAT the appellant file outlines of evidence and documents (other than the agreed documents) on which he intends to rely by 4 March 2022;
3. THAT the respondent file outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 18 March 2022;
4. THAT the appellant file a written outline of submissions by 1 April 2022;
5. THAT the respondent file a written outline of submissions by 15 April 2022; and
6. THAT discovery be informal.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2022 WAIRC 00041

APPEAL AGAINST THE DECISON TO TAKE DISCIPLINARY ACTION ON 14 OCTOBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PROSPER BAENI
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
	MS B CONWAY - BOARD MEMBER
	MS O GIALUISI - BOARD MEMBER
DATE	WEDNESDAY, 2 FEBRUARY 2022
FILE NO	PSAB 31 OF 2021
CITATION NO.	2022 WAIRC 00041

Result	Order issued
Representation	
Appellant	Mr P Baeni on his own behalf
Respondent	Mr M McIlwaine of Counsel

Order

HAVING heard from Mr P Baeni on his own behalf and Mr M McIlwaine of Counsel for the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the directions hearing listed for Wednesday, 2 February 2022 at 2.00 pm be adjourned and re-listed on a date to be fixed after 2 March 2022.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2022 WAIRC 00040

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION DATED 21 OCTOBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONALD MCLEAN
	APPELLANT
	-v-
	PATHWEST LABORATORY MEDICINE WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
	MR K SNEDDON - BOARD MEMBER
	MR P HESLEWOOD - BOARD MEMBER
DATE	WEDNESDAY, 2 FEBRUARY 2022
FILE NO	PSAB 32 OF 2021
CITATION NO.	2022 WAIRC 00040

Result	Order issued
Representation	
Appellant	Mr D McLean on his own behalf
Respondent	Ms S Smith

Order

HAVING heard from Mr D McLean on his own behalf and Ms S Smith for the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT the respondent's application for summary dismissal of the appeal under s 27(1)(a) of the IR Act for want of jurisdiction be listed for hearing on a date to be fixed.
2. THAT the appellant file any documentary evidence upon which he seeks to rely in relation to the application for summary dismissal together with any written submission on or before 16 February 2022.
3. THAT there be liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2022 WAIRC 00022

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 3 NOVEMBER 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY JENNIFER MEUNIER
	APPELLANT
	-v-
	HOUSING AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON – CHAIR
	MR S DANE – BOARD MEMBER
	MR M ABRAHAMSON – BOARD MEMBER
DATE	MONDAY, 24 JANUARY 2022
FILE NO.	PSAB 34 OF 2021
CITATION NO.	2022 WAIRC 00022

Result	Direction Issued
Representation	
Applicant	Ms M Meunier
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from the appellant on her own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT discovery be informal;
2. THAT the parties file a joint statement of agreed facts and bundle of agreed documents by no later than 8 March 2022;
3. THAT the appellant files outlines of evidence and documents (other than the agreed documents) on which she intends to rely by 21 March 2022;
4. THAT the respondent files outlines of evidence and documents (other than the agreed documents) on which it intends to rely by 11 April 2022;
5. THAT the appellant files a written outline of submissions and any list of authorities upon which she intends to rely by no later than 26 April 2022;
6. THAT the respondent files a written outline of submissions and any list of authorities upon which it intends to rely by no later than 3 May 2022;
7. THAT this matter be listed for final hearing on 10 May 2022 and 11 May 2022; and
8. THAT the parties have liberty to apply on short notice.

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

2022 WAIRC 00064

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GAYLE PRISCILLA TAWHA
	APPLICANT
	-v-
	NULLAGINE COMMUNITY RESOURCE CENTRE INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 15 FEBRUARY 2022
FILE NO.	U 23 OF 2021
CITATION NO.	2022 WAIRC 00064

Result	Direction issued
Representation	
Applicant	Ms G Tawha
Respondent	Ms M Palmer

Direction

WHEREAS the Commission issued Direction [2021] WAIRC 00564 on 4 November 2021 to program the hearing and determination of this application;

AND WHEREAS the parties each made a request to the Commissioner to amend the Directions in order to file outlines of witness evidence;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT directions 3 to 8 of [2021] WAIRC 00564 be vacated;

2. THAT the applicant file and serve upon the respondent an outline of witness evidence for herself, upon which she intends to rely by no later than 16 February 2022;
3. THAT the respondent file and serve upon the applicant any outlines of witness evidence upon which it intends to rely by no later than 16 February 2022;
4. THAT the respondent and applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 24 February 2022;
5. THAT the matter be listed for hearing for 3 days on 1 March 2022, 2 March 2022 and 3 March 2022; and
6. THAT the parties have liberty to apply on short notice.

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

2022 WAIRC 00062

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VERONA MARIE WAUCHOPE
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 11 FEBRUARY 2022
FILE NO.	U 53 OF 2021
CITATION NO.	2022 WAIRC 00062

Result	Direction issued
Representation	
Applicant	Ms V Wauchope
Respondent	Mr S Pack (of counsel)

Direction

HAVING convened a conference between Ms V Wauchope on her own behalf and Mr S Pack on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs by consent:

1. THAT the parties file a statement of agreed facts by no later than 25 February 2022;
2. THAT the parties file a bundle of agreed documents by no later than 18 March 2022;
3. THAT the applicant file and serve upon the respondent any outlines of witness evidence and any documents upon which they intend to rely by no later than 8 April 2022;
4. THAT the respondent file and serve upon the applicant any outlines of witness evidence and any documents in reply by no later than 29 April 2022;
5. That the applicant may file and serve upon the respondent any further outlines of witness evidence and any documents in reply by no later than 13 May 2022;
6. THAT the applicant file and serve an outline of submissions upon which they intend to rely by no later than 27 May 2022;
7. THAT the respondent file and serve an outline of submissions upon which it intends to rely by no later 10 June 2022;
8. THAT the matter be listed for hearing for 3 days on a date to be fixed ; and
9. THAT the parties have liberty to apply at short notice.

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

2022 WAIRC 00019

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLIRRA BETH SIMPSON
	APPLICANT
	-v-
	BALDJAMAAR FOUNDATION
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	THURSDAY, 20 JANUARY 2022
FILE NO.	U 71 OF 2021
CITATION NO.	2022 WAIRC 00019

Result	Direction Issued
Representation	
Applicant	Mr S Alexander (of counsel)
Respondent	Mr D Seymour (of counsel)

Direction

HAVING heard from Mr S Alexander on behalf of the applicant and Mr D Seymour on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT each party shall give an informal discovery by serving its list of documents on each other by no later than 10 February 2022;
2. THAT inspection and provision of the documents to each other shall be completed by no later than 17 February 2022;
3. THAT the applicant file and serve upon the respondent any outlines of witness evidence upon which they intend to rely, including any documents they intend to submit through that witness by no later than 17 March 2022;
4. THAT the respondent file and serve upon the applicant any outlines of witness evidence upon which it intends to rely, including any documents it intends to submit through that witness by no later than 31 March 2022;
5. That the applicant may file and serve upon the respondent any outlines of witness evidence in reply, including any documents they intend to submit through that witness by no later than 21 April 2022;
6. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 2 weeks prior to the hearing;
7. THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by no later than 1 week prior to the hearing;
8. THAT the matter be listed for hearing for 2 days on a date to be fixed; and
9. THAT the parties have liberty to apply on short notice.

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

2022 WAIRC 00014

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH KUM-TUCK WONG
	APPLICANT
	-v-
	WESTERN AUSTRALIA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	TUESDAY, 18 JANUARY 2022
FILE NO/S	U 90 OF 2021
CITATION NO.	2022 WAIRC 00014

Result	Order issued
Representation	
Applicant	Dr K Wong on his own behalf
Respondent	Ms E Hadrys and Ms S Waterton

Order

HAVING heard from Dr K Wong on his own behalf and Ms E Hadrys and Ms S Waterton on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby orders –

1. THAT the respondent's application for dismissal pursuant to s 27(1)(a) of the IR Act be listed for a 1 day hearing on a date to be fixed after 5 April 2022.
2. THAT the respondent file a statement of any agreed facts by no later than 8 February 2022.
3. THAT the applicant file outlines of witness evidence complying with Practice Note 9 of 2021 for each witness he proposes to call at the hearing of the dismissal application by no later than 22 February 2022.
4. THAT the respondent file outlines of witness evidence complying with Practice Note 9 of 2021 for each witness it proposes to call at the hearing of the dismissal application by no later than 8 March 2022.
5. THAT the applicant file his outline of submissions in relation to the dismissal application by no later than 22 March 2022.
6. THAT the respondent file its outline of submissions in relation to the dismissal application by no later than 5 April 2022.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Justice (Youth Custodial Officers) CSA Agreement 2021 PSAAG 8/2021	01/27/2022	The Department of Justice	The Civil Service Association of Western Australia Incorporated	Commissioner T Emmanuel	Agreement registered
Shire of Yalgoo Union Industrial Agreement 2021 AG 16/2021	01/25/2022	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Shire of Yalgoo	Commissioner T B Walkington	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2022 WAIRC 00031

APPEAL AGAINST THE DECISION TO TAKE DISCIPLINARY ACTION ON 5 NOVEMBER 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANNE MARIE FLETCHER

APPELLANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
MR D HILL - BOARD MEMBER
MS R SINTON - BOARD MEMBER

DATE FRIDAY, 28 JANUARY 2022

FILE NO PSAB 35 OF 2020

CITATION NO. 2022 WAIRC 00031

Result Appeal discontinued by leave

Representation

Appellant Ms A Fletcher on her own behalf

Respondent Mr M Aulfrey

Order

WHEREAS the appellant sought and was granted leave to discontinue the appeal, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the interlocutory hearing listed for Tuesday, 1 February 2022 at 10.30 am and substantive hearing listed for Monday, 7 February 2022 and Tuesday, 8 February 2022 at 10.30 am be vacated.

2. THAT the matter PSAB 35 of 2020 be and is hereby discontinued by leave.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2022 WAIRC 00054

APPEAL AGAINST THE DECISION OF EMPLOYER DATED 28 MAY 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2022 WAIRC 00054
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON MR J RAJA - BOARD MEMBER MS S SMITH - BOARD MEMBER
HEARD ON THE PAPERS	**:**	SUBMISSIONS RECEIVED: FRIDAY, 17 DECEMBER 2021, MONDAY, 20 DECEMBER 2021, THURSDAY, 23 DECEMBER 2021, WEDNESDAY, 5 JANUARY 2022, THURSDAY, 14 JANUARY 2022, FRIDAY, 18 JANUARY 2022, THURSDAY, 27 JANUARY 2022, FRIDAY, 4 FEBRUARY 2022, MONDAY, 7 FEBRUARY 2022
DELIVERED	**:**	WEDNESDAY, 9 FEBRUARY 2022
FILE NO.	**:**	PSAB 27 OF 2021
BETWEEN	**:**	TRAN DE QUACH Appellant AND NORTH METROPOLITAN HEALTH SERVICES Respondent

CatchWords	**:**	Industrial Law (WA) – Public Service Appeal Board – Jurisdiction –Whether or not the appellant was a government officer – Appellant found not to be a member of the respondent's salaried staff – Appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) *Public Sector Management Act 1994* (WA) *Health Service Act 2016* (WA) *WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2020*
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	Mr T Quach on his own behalf
Respondent	**:**	Ms M Di Lello

Case(s) referred to in reasons:

Fenton v WA Country Health Service - SW [2021] WAIRC 00214; (2021) 101 WAIG 585

McGinty v Department of Corrective Services [2012] WAIRC 00054; (2012) 92 WAIG 190

Reasons for Decision

1 These are the unanimous reasons of the Public Service Appeal Board (Board).

2 The appellant, Mr Tran De Quach, lodged a Form 8B - Notice of Appeal on 15 October 2021 against his employer's decision to take disciplinary action in the form of a reprimand and disciplinary transfer. The appeal purports to be made under s 80I(1)(c) of the *Industrial Relations Act 1979* (WA) (IR Act) and s 172 of the *Health Services Act 2016* (WA) (Health Services Act). The respondent, North Metropolitan Health Services (Health Service), seeks the dismissal of the appeal on the basis that Mr Quach does not have standing to appeal under s 172 of the Health Services Act as he is not a government officer.

3 The Board is required to decide whether Mr Quach is a 'government officer' for the purpose of s 80I(1)(c) of the IR Act. The answer turns on whether he is a public service officer or on the Health Service's salaried staff. If he is not, the Board has no jurisdiction to deal with or determine his appeal.

4 The parties agreed that the issue of Mr Quach's standing be determined on the papers as a preliminary issue.

Background: the disciplinary action

5 The disciplinary action against which Mr Quach has appealed is a decision of 20 September 2021 by which Mr Quach was issued a formal reprimand and transferred from the position of Food Service Attendant at Graylands Hospital to the position of Cleaner 'initially located at Graylands Hospital'. Mr Quach does not appeal the findings in relation to his conduct. Rather he appeals only against the sanction imposed.

6 On 2 October 2020, the Health Service gave Mr Quach notice that:

(a) an investigation into a suspected breach of discipline had concluded;

(b) the allegations were found substantiated;

(c) the proposed disciplinary action would be a transfer to Sir Charles Gairdner Hospital in the catering department; and

(d) Mr Quach had an opportunity to respond to the proposed disciplinary action before a final decision is made.

7 Mr Quach accepted the proposed disciplinary action and elected not to respond to the letter of 2 October 2020.

8 Subsequently, on 11 May 2021, the Health Service advised Mr Quach that the disciplinary action proposed on 2 October 2020 was rescinded. The Health Service instead proposed disciplinary action in the form of a reprimand and transfer to a Cleaner position at Graylands Hospital. Mr Quach was given a further opportunity to respond before a final decision was made. This was the form of disciplinary action ultimately imposed.

9 While Mr Quach accepted the proposed disciplinary action involving a transfer to Sir Charles Gardiner Hospital in catering, he is aggrieved by the ultimate decision to transfer him to a Cleaner position at Graylands Hospital. At this preliminary stage, Mr Quach's reasons for being aggrieved by this sanction were not explored. The transfer would not involve a change to Mr Quach's classification. However, we note that he has over 40 years of experience working as a Food Service Attendant in the public hospital system. Since 2018 he has worked in this position at Graylands Hospital. It may be inferred that remaining at the same hospital in a different position is perceived by him to be associated with a degree of public humiliation that would not come with a transfer to a different hospital. Another inference that might be made is that he is comfortable and familiar with catering work, and cleaning will involve him having to learn new skills and work methods, so that he will feel less productive. Or he may be disappointed by the prospect of no longer having interactions with hospital patients as a Food Service Attendant.

10 Similarly, the reasons for the Health Service's changed position were not explored at this stage.

11 Neither parties' reasons concerning the appropriateness of the disciplinary sanction are relevant to the determination of the question of Mr Quach's standing.

Mr Quach's submissions

12 Mr Quach filed several separate written submissions, including reply submissions received on 7 February 2022, that expressed his disappointment in how he had been treated and what he thought the Health Service ought to have done or not done. His submissions did not address the issue for determination, that is, whether he is a government officer, except that Mr Quach simply asserted that he has been a public servant for 41 years. He relies upon his payslips as confirming that he is a full-time salaried employee, as the payslips refer to 'salary'.

The Health Service's submissions

13 The Health Service submits that Mr Quach is not a public service officer for the purpose of the definition of 'government officer', nor is he employed on the salaried staff of the Health Service. Rather, the Health Service submits that he is remunerated by way of wages pursuant to the applicable industrial instrument, namely the *WA Health System - United Workers Union (WA) - Hospital Support Workers Industrial Agreement 2020* (Industrial Agreement). It relies upon the terms of cl 19 of the Industrial Agreement, which refers to 'wages', submitting that this term accurately reflects that Food Service Attendants are remunerated for time worked, as opposed to a fixed periodical salary. It points to other provisions of the Industrial Agreement supporting its view that the remuneration Mr Quach was paid was wages as opposed to salary.

14 The Health Service also points out that Mr Quach's duties are not for administrative, managerial or technical services, so as to mean that his role could be described as being within the administrative or professional ranks of the public service.

Evidence

15 The Board had before it and considered:

(a) the Job Description Form for the position of Food Service Attendant, Hospital Support Workers Agreement Level 1/2, Position Number 601441 (JDF);

(b) Mr Quach's payroll summary for the period ended 28 April 2019;

(c) Mr Quach's position history;

(d) a payslip for the period ended 7 November 2021;

(e) a payslip for the period ended 21 November 2021; and

(f) a payslip for the period ended 5 December 2021.

16 According to the JDF, Mr Quach's prime function/key responsibilities as a Food Service Attendant involved:

(a) the provision of assistance in the preparation, plating and delivery of meals; and

(b) maintaining a clean and hygienic work environment in accordance with relevant Food Safety Standards.

He reports to a HSO Level G5 Catering Coordinator. He has no direct reports.

17 The JDF provides a summary of the position's duties as follows:

1. General

1.1 Complies with HACCP guidelines for the safe preparation, distribution and storage of food.

1.2 Assists the Leading Hand in achieving daily objectives.

1.3 Actively participates in HACCP and quality monitoring and recording systems.

1.4 Participates in food and beverage production and distribution to patients as required.

1.5 Completes kitchen cleaning according to the relevant cleaning schedule.

1.6 Contributes to the delivery of customer focused service.

1.7 Works cooperatively and collaboratively with other members of the Patient support Services Team.

1.8 Contributes to the cost efficient use of hospital resources.

1.9 Liaise with Dietetic, Speech Pathology and other departments as required.

2. NMHS Governance, Safety and Quality Requirements

2.1 Participates in the maintenance of a safe work environment

2.2 Participates in an annual performance development review.

2.3 Supports the delivery of safe patient care and the consumers' experience including participation in continuous quality improvement activities in accordance with the requirements of the National Safety and Quality Health Service Standards and other recognised health standards.

2.4 Completes mandatory training (including safety and quality training) as relevant to role.

2.5 Performs duties in accordance with Government, WA Health, North Metropolitan Health Service and Departmental / Program specific policies and procedures.

2.6 Abides by the WA Health Code of Conduct, Occupational Safety and Health legislation, the Disability Services Act and the Equal Opportunity Act.

3. Undertakes other duties as directed.

18 The payslips all contain a line described as 'Full Time Salary', which, as at 7 November 2021, had adjacent to it the figure $56,102.57. This figure is not one which appears in the Industrial Agreement. Rather, it appears to be derived by multiplying the hourly rate specified in the payslips under the heading 'Taxed Earnings' for full-time hours per week worked over a year. The specified hourly rate, $28.30, is the weekly base rate of pay for a Level 1/2 3rd year employee set out in cl 19.1 of the Industrial Agreement divided by 38 hours.

19 The payslips otherwise demonstrate that Mr Quach's remuneration was calculated by reference to an hourly rate of pay for base hours, allowances for working Saturday, Sunday and public holidays and time off in lieu.

The Board's jurisdiction

20 The Board's jurisdiction is set out in s 80I of the IR Act. Relevantly, the Board has jurisdiction to review a decision or finding arising out of a disciplinary process under s 172 of the Health Services Act on appeal by a 'government officer'. Section 80C(1) of the IR Act defines government officer to mean:

…

government officer means —

(a) every public service officer; and

(aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and

(ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and

(b) every other person employed on the salaried staff of a public authority; and

(c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*,

but does not include —

(d) any teacher; or

(e) any railway officer as defined in section 80M; or

(f) any member of the academic staff of a post-secondary education institution;

…

21 There is no suggestion that Mr Quach falls within sub-clauses (aa), (ab) or (c) of the definition. The relevant or possibly applicable sub-clauses are (a) 'public service officer', and (b) 'employed on the salaried staff of a public authority'.

Is Mr Quach a public service officer?

22 Public service officer is defined in s 7 of the IR Act to mean 'a public service officer within the meaning of the *Public Sector Management Act 1994*;'.

23 The *Public Sector Management Act 1994* (WA) (PSMA) defines in s 3, public service officer to mean 'an executive officer, permanent officer or term officer employed in the public service under Part 3;'.

24 Public service is defined in Part 3, s 34 of the PSMA as constituted by:

(a) departments; and

(b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and

(c) persons employed under this Part, whether in departments or in the Senior Executive Service in SES organisations or otherwise.

25 The Health Service is a health service provider established under s 32 of the Health Services Act. It is neither a department, nor an SES organisation as defined in the PSMA.

26 Mr Quach's appointment and employment is pursuant to Part 9, s 140 of the Health Services Act. Under Part 9, s 104(3) of the Health Services Act, Part 3 of the PSMA does not apply to employees of health service providers. That section provides:

> The PSM Act Part 3 does not apply to employees.

27 Mr Quach is not employed under Part 3 of the PSMA. As he is not employed under Part 3, and the Health Service is neither a department, nor an SES Organisation, he is not a public service officer as defined. He is therefore not a government officer as defined within s 80C(1)(a) of the IR Act.

Is Mr Quach on the Health Service's salaried staff?

28 There is no dispute, and we find that the Health Service is a public authority for the purpose of the sub-clause (b) definition of government officer.

29 The Board recently considered the meaning of 'salaried staff' in the s 80C(1)(a) definition in ***Fenton v WA Country Health Service - SW*** [2021] WAIRC 00214; (2021) 101 WAIG 585. After summarising a series of decisions by the Industrial Appeal Court, the Board and the Commission concerning the meaning of salaried staff, the Board adopted and applied the approach of the learned Commissioner Kenner (as he was then) in ***McGinty v Department of Corrective Services*** [2012] WAIRC 00054; (2012) 92 WAIG 190 at [10]-[11], concluding at [50], that by referring to salaried staff the legislature intended to draw a distinction between those employees paid on a salaried basis and those who are paid wages. The dichotomy focuses on the frequency and structure of fixed periodic payments as well as the services for which the payment is made.

30 Whether a person is on salaried staff is a question of fact. Importantly, that remuneration is described as 'salary' is not conclusive. Thus in ***McGinty***, a vocational support officer was determined not to be employed on the salaried staff of the relevant agency, notwithstanding the fact that the applicable industrial instrument referred to remuneration arrangements using the term 'annualised salary'. Similarly, in ***Fenton***, Ms Fenton was found not to be a government officer or on the salaried staff of her employer, notwithstanding the fact that her contract of employment referred to the term 'salary' and the industrial instrument also used the term 'salary' in various clause headings.

31 The Industrial Agreement that applies to Mr Quach uses the terms 'wages' and 'salary' interchangeably. For example, the word 'salary' is used in clauses dealing with underpayments, salary packaging, and leave. Where the word 'salary' is used, it is intermittent and interchanged with other terms like 'ordinary rates of pay' within the same clause. Notably, none of the references to 'salary' are contained in clauses that determine rates of remuneration. Rather, the word is used in contexts generally dealing with the methods by which remuneration and other entitlements are satisfied.

32 On the other hand, the Industrial Agreement's clauses dealing substantively with rates of remuneration refer to 'wages'. In particular, cl 19 is headed 'Classification and Wage Rates'. Significantly, it provides for payment of a 'weekly base rate of pay' for all 13 classifications covered by the Industrial Agreement. Clause 19.4 provides that wages are paid fortnightly, and overtime and penalty rates, where applicable, will be paid at least monthly.

33 Under the Industrial Agreement, the weekly base rate of pay is payable for full-time hours, being an average of 38 hours per week: cl 11. Clause 13 'Hours of Work' dictates the work cycles, maximum hours and spread of hours over which the ordinary hours can be worked. Hours worked outside of ordinary hours attract overtime rates: cl 16. Further, the Industrial Agreement specifies rates of pay other than the weekly base rate of pay for shift work: cl 17, and weekend work: cl 18.

34 In addition to the weekly base rate of pay, the Industrial Agreement provides for various miscellaneous allowances in cl 24.

35 Mr Quach's remuneration is determined by the terms of the Industrial Agreement. His payslips do not determine his remuneration entitlements but reflect them. Clearly, Mr Quach's earnings were both regular and periodic as well as being determined, in part, by reference to time. However, his earnings were not entirely fixed in the necessary sense, because overtime, penalties and other allowances were payable depending on what work was performed by him and when it was performed. The nature and structure of his remuneration arrangements indicate that his remuneration is properly categorised as wages within the wages/salary binary.

36 This categorisation is consistent with the nature of the services Mr Quach performs and, indeed, the nature of services involved in the vast majority of the classifications covered by the Industrial Agreement. It is worth commenting on the nature of the positions described in cl 19 of the Industrial Agreement. There are approximately 100 Hospital Worker jobs listed. We mention a few: Chef, Housekeeper, Gardner, Cook, Orderly, Storeperson, Bus Driver, Cleaner, Patient Care Assistant, and Laundry Worker. While the Industrial Agreement's occupational coverage is broad, this list nevertheless gives a fair sense that the coverage is of manual and operational occupations.

37 As a Food Service Attendant, and indeed as a Cleaner, the nature of the services which Mr Quach provides and for which he is remunerated are manual services. His duties do not involve organisational management or duties of an administrative nature. He does not manage others in the workplace. It cannot be said his earnings were for administrative, managerial or technical services, nor could his role be described as being in the administrative or professional ranks of the public service.

38 Having regard both to the structure of Mr Quach's remuneration and the services he provides in respect of which remuneration is paid, we do not consider he was a member of the Health Service's salaried staff.

39 As Mr Quach is not employed on the Health Service's salaried staff to bring him within the definition of a government officer within s 80C(1) of the IR Act, he does not have standing to bring the appeal, and the appeal is beyond the Board's jurisdiction.

2022 WAIRC 00055

APPEAL AGAINST THE DECISION OF EMPLOYER DATED 28 MAY 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRAN DE QUACH
	APPELLANT
	-v-
	NORTH METROPOLITAN HEALTH SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	SENIOR COMMISSIONER R COSENTINO - CHAIRPERSON
	MR J RAJA - BOARD MEMBER
	MS S SMITH - BOARD MEMBER
DATE	WEDNESDAY, 9 FEBRUARY 2022
FILE NO	PSAB 27 OF 2021
CITATION NO.	2022 WAIRC 00055

Result	Appeal dismissed
Representation	
Appellant	Mr T Quach on his own behalf
Respondent	Ms M Di Lello

Order

HAVING heard from Mr T Quach on his own behalf, and Ms M Di Lello on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appeal be and is hereby dismissed for want of jurisdiction.

(Sgd.) R COSENTINO,
Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2022 WAIRC 00048

REVIEW OF DECISION - S.61A - OSH ACT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	RSV GROUP PTY LTD
	APPLICANT
	-v-
	WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER T B WALKINGTON
DATE	FRIDAY, 4 FEBRUARY 2022
FILE NO/S	OSHT 10 OF 2021
CITATION NO.	2022 WAIRC 00048

Result	Applicant granted leave to discontinue
Representation	
Applicant	Mr R Lombardo
Respondent	Ms A Sukoski (of counsel)

Order

WHEREAS this is a referral pursuant to section 61A of the *Occupational Safety and Health Act 1984* (WA) to review the decision of the Worksafe Western Australia Commissioner;

AND WHEREAS on 1 February 2022 the applicant sought leave to withdraw the referral and the respondent consented to the withdrawal;

AND WHEREAS on 4 February 2022, a *Form 1A – Multipurpose Form* was filed to discontinue in respect of the referral;

NOW THEREFORE, the Tribunal, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984* (WA) grants leave to the applicant to discontinue the referral and orders:

THAT the application be, and by this order is discontinued by leave.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]