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FULL BENCH—Appeals against decision of Industrial Magistrate—

2023 WAIRC 00793

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 170/2021 GIVEN ON 22 MARCH 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2023 WAIRC 00793
CORAM	:	SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL COMMISSIONER C TSANG
HEARD	:	WEDNESDAY, 20 SEPTEMBER 2023
DELIVERED	:	THURSDAY, 5 OCTOBER 2023
FILE NO.	:	FBA 1 OF 2023
BETWEEN	:	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Appellant AND DIRECTOR GENERAL AS THE EMPLOYING AUTHORITY, DEPARTMENT OF JUSTICE Respondent

CatchWords	:	Industrial Law (WA) – Appeal against a decision of the Industrial Magistrate – Interlocutory application seeking permission to amend grounds of appeal – Substitution of new grounds of appeal – Respondent opposes leave being granted – Factors to consider – Notice of appeal to 'clearly and concisely set out the grounds of appeal and what alternative decision the appellant seeks' – Grounds must specify particulars relied on to demonstrate that it is against the evidence and the weight of evidence and specific reasons of what is alleged to be wrong in law – Timing – Reasons for amendments – Do the amended grounds of appeal reveal a reasonably arguable ground of appeal? – Consequences to the appellant if the amendments are not allowed — Prejudice to the respondent – Leave granted to amend grounds of appeal
Legislation	:	*Industrial Relations Commission Regulations 2005* (WA)
Result	:	Application granted

Representation:

Counsel:		
Appellant	:	Ms D Larson of counsel and Ms J Moore of counsel
Respondent	:	Mr J Carroll of counsel
Solicitors:		
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Anderson v Rogers Seller & Myhill Pty Ltd [2007] WAIRC 00218; (2007) 87 WAIG 289

Bilos v Aurion Gold [2003] WAIRC 09858; (2004) 84 WAIG 1008

Gold Valley Iron Pty Ltd (in liq) v Ops Screening & Crushing Equipment Pty Ltd [2022] WASCA 134

Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491

Reasons for Decision

FULL BENCH:

1 The appellant, The Civil Service Association of Western Australia Incorporated (**CSA**), has appealed from a decision of the Industrial Magistrate's Court (**IMC**) handed down on 22 March 2023 dismissing the CSA's claim that the respondent, the **Director General** Department of Justice, had breached clauses 36A(4), (5) and (6) of the *Public Service **Award** 1992*.

2 The appellant is seeking permission to amend its grounds of appeal, by substitution of three new grounds of appeal for the original four grounds.

3 The respondent opposes leave being granted to amend, because:

(a) the grounds advance matters that were not advanced by the CSA at trial;

(b) the grounds are not sufficiently particularised; and

(c) the grounds, even if established, cannot result in a successful appeal.

The CSA's claim before the IMC

4 The claim before the IMC arose out of broad facts which were relatively uncontroversial.

5 Clause 36A of the Award relevantly provides:

> Officer Entitlement to Representation
>
> (1) For the purposes of representation under this clause, significant matters are discipline, performance, officer entitlements, fitness for work and return to work.
>
> …
>
> (4) If:
>
> (a) a representative nominated by an officer, being an organisation within the meaning of the *Industrial Relations Act 1979* (the Act), an employee or officer of such an organisation, a union representative within the meaning of clause 36(2) of this Award, a person registered under section 112A of the Act, an employee or officer of such a person, or a legal practitioner, or
>
> (b) an officer,
>
> notifies the employer in writing that a representative acts for the officer in relation to a matter and provides the identity and contact details of the representative, the employer must recognise that person's representational capacity in all future dealings on that matter.
>
> (5) The presence of a representative is not necessary at every meeting between an officer and the employer (or a representative of the employer). Where the meeting involves a significant matter the representative shall be permitted to attend. All parties will make reasonable efforts to avoid unnecessary delays.
>
> (6) The employer accepts a representative can advocate on behalf of the officer at the meeting. For the purposes of this clause only, an advocate may make comments on the process, ask questions, seek clarification of questions put to the officer, seek adjournments to confer with the officer and provide further comments at the conclusion of the interview, but will not answer questions of fact put to the officer.

6 Two of the Director General's employees appointed the CSA to represent them in the course of a process dealing with allegations that those employees had committed a breach of discipline.

7 The breach of discipline matters were 'significant matters' for the purpose of cl 36A(1) and therefore attracted the application of cl 36A.

8 The CSA informed the Director General in writing that it represented the employees.

9 The Director General proceeded to conduct meetings with each of the employees for the purpose of delivering to them a letter of outcome relating to the allegations of breach of discipline. Those meetings were arranged by sending an electronic meeting

invitation on 21 January 2021 to the employees, for a meeting with Professional Standards on 22 January 2021 to advise of the outcome of the disciplinary process.

10 The Director General advised the employees in writing that they were entitled to bring a support person or union representative to the meeting. However, the communications scheduling the meetings were not sent directly to the CSA or any of the CSA's officers or employees when they were sent to the employees.

11 The employees contacted the CSA after receiving the Director General's notice of the meeting. A representative from the CSA did then attend the meetings held on 22 January 2021 in relation to each employee.

12 The learned Industrial Magistrate summarised the CSA's Award breach allegations arising from the events of 21 January 2022 and 22 January 2022 as:

(a) Scheduling the two meetings for 22 January 2022 without communicating directly with the CSA.

(b) Insisting on meeting with an employee in person and not permitting the CSA to attend in place of the employee.

(c) Failing to change a meeting time to allow a particular CSA representative to attend.

(d) Preventing a CSA representative from discussing certain matters during a meeting on 22 January 2022.

(e) Failing to give the CSA correspondence on behalf of, or in place of, an employee the CSA represented.

13 The learned Industrial Magistrate dismissed all five allegations.

14 The breaches alleged at paragraphs (b), (c), (d) and (e) are not the subject of the grounds of appeal as proposed to be amended. The proposed amended appeal grounds only concern the findings related to the alleged breaches in paragraph (a): the failure to communicate directly with the CSA.

15 Relevant to the failure to communicate directly with the CSA, the learned Industrial Magistrate found that cl 36A(4) was triggered by the CSA's notification that it was acting for the employees, and that the Director General was therefore required to recognise the CSA's representational capacity in all future dealings on the disciplinary matter: [15].

16 Her Honour found:

(a) The relevant 'person' having representational capacity was the CSA: [20].

(b) Both the invitation to attend the 22 January 2021 meeting and the meeting itself were 'dealings' on the matter: [23] and [24].

(c) By advising the employees that the employees were permitted to have a union representative attend the meeting, the Director General complied with the requirement to recognise the CSA's representational capacity in the matter: [35] and [71].

When will leave be granted to amend grounds of appeal?

17 The Full Bench has power to grant leave to amend grounds of appeal. The power is discretionary.

18 In dealing with this application the Full Bench is conscious that neither the Commission, nor the IMC, are courts of pleading. The Commission is required to act according to equity, good conscience and the substantial merits of the case, having regard to the interests of the persons immediately concerned and for the interests of the community as a whole: s 26(1)(a) and (c). The Commission may allow amendments on any terms it thinks fit, correct, amend or waive errors, defects and irregularities and generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter: s 27(1)(l), (m) and (v); ***Bilos v Aurion Gold*** [2003] WAIRC 09858; (2004) 84 WAIG 1008 at [19].

19 While the discretion will be exercised having regard to the particular facts and circumstances of each case, some of the factors which are ordinarily relevant when dealing with an application to amend grounds of appeal are:

(a) the time when notice was first given to the Full Bench and the respondent of the intention to apply for the amendment;

(b) the explanation, if any, for seeking amendment;

(c) whether the proposed amendment constitutes a reasonably arguable ground of appeal;

(d) the consequences to the appellant of not granting leave to amend;

(e) the extent of any prejudice to the respondent;

(f) any measures which may be taken to eliminate or reduce the prejudice to the respondent; and

(g) issues of delay and costs.

See ***Anderson v Rogers Seller & Myhill Pty Ltd*** [2007] WAIRC 00218; (2007) 87 WAIG 289 at [106].

20 Regulation 102(2) of the *Industrial Relations Commission Regulations 2005* (WA) requires that a notice of appeal 'clearly and concisely set out the grounds of appeal and what alternative decision the appellant seeks'.

21 Regulation 102(3) of *Industrial Relations Commission Regulations 2005* (WA) provides that it is not sufficient to allege that a decision or part of it is against the evidence or the weight of the evidence or is wrong in law. The grounds must specify the particulars relied on to demonstrate that it is against the evidence and the weight of evidence and the specific reasons why it is alleged to be wrong in law.

22 Ultimately, the purpose of the grounds of appeal is to give the respondent fair notice of the case it is required to meet.

Timing

23 The appeal was commenced on 12 April 2023. It was set down for a directions hearing on 2 June 2023 at which time, the CSA advised the Full Bench it may seek to amend the grounds of appeal. An application to amend the grounds of appeal was then lodged on 16 June 2023. After the respondent filed submissions opposing the proposed amendments, the CSA sought further amendments by application dated 23 August 2023, and then further amendments by application during the hearing of its application to amend on 20 September 2023.

24 The Director General did not oppose the CSA's 23 August 2023 application to amend on the grounds of delay, but did oppose leave being granted for the CSA to make further amendments to the 23 August 2023 version of the grounds, if leave was not granted to the CSA on that version.

25 The appeal has not yet been listed for hearing. While some time has passed since the appeal was commenced, the only step that has been taken in the interim is the filing of the appeal book.

26 The timing of the amendment is such that no significant issues arise concerning delay and costs. While there is some delay, and some additional cost, it is not out of the ordinary course of adversarial proceedings.

27 The timing of the amendment is not itself a factor against the grant of leave.

Explanation for amendment

28 The CSA's explanation for the amendment is that it will narrow the grounds of appeal and clarify those grounds which remain.

29 The grounds as originally formulated are deficient. They are neither clear nor concise. As a general observation, they do not identify the learned Industrial Magistrate's findings that are said to be in error, nor why the findings involve error.

30 The amendments seek to cure these deficiencies.

31 The explanation is a good reason for granting leave if the amendments do address the deficiencies.

Do the amended grounds reveal a reasonably arguable ground of appeal?

Ground 1

32 Proposed amended ground 1 is as follows:

1. In dismissing alleged contraventions (i) and (iii) in matter M170 of 2021, the Industrial Magistrate erred in law in interpreting clause 36A of the *Public Service Award 1992* (**the Award**) by finding in paragraphs [36] and [72] of the reasons for decision that clause 36A did not place an obligation on the Respondent to serve 'invitations and the like' upon the nominated representative of an officer where the invitation relates to a significant matter.

Particulars

A. Clause 36A provided officers involved in significant matters (e.g. discipline and performance management) with a 'right to representation': ***Clause 36A(2)***.

B. An officer's right to representation included advocacy: ***Clause 36A(2)***.

C. While the presence of an officer's representative was not required at every meeting between an officer and the Respondent, the Respondent was required to:

i. recognise the officer's representative;

ii. recognise the representational capacity of the ~~Respondent's~~ Appellant's representative in all future dealings on that matter;

iii. permit the officer's representative to attend all meetings involving significant matters;

iv. allow the officer's representative to advocate on behalf of the officer at those meetings; and

v. make reasonable efforts to avoid unnecessary delays: ***Clause 36A(3), (4), (5)***.

D. Given the officer's right to representation and the above express obligations on the Respondent in clause 36A, it was erroneous for the Industrial Magistrate to conclude that clause 36A did not require the Respondent to correspond with the officer's representative about planning meetings relating to significant matters involving the officer.

E. The proper construction of clause 36A required the Respondent to correspond with the officer's representative about planning meetings relating to significant matters involving the officer.

33 The respondent says that this proposed amended ground is deficient because it fails to particularise the alleged correct construction of cl 36A and fails to identify which part of cl 36A is to be construed.

34 While the ground does not expressly deal with these matters, it is implicit reading the ground as a whole, including the references to specific paragraphs in the learned Industrial Magistrate's reasons, that it is directed at the learned Industrial Magistrate's construction of the words in cl 36A(4) 'recognise that person's representational capacity'.

35 It is also readily apparent from Particular E that the CSA contends that these words mean 'correspond with [the representative] about future dealings in the matter'.

36 Accordingly, the ground does provide fair notice of the CSA's case to the respondent.

37 The Director General further says that the ground fails to challenge the learned Industrial Magistrate's factual findings that the Director General recognised the CSA's representational capacity, and therefore, even if established, the ground cannot result in a successful appeal.

38 However, the learned Industrial Magistrate's findings in this regard (being the findings at [35] and [71]) were based on the construction of the words which the ground of appeal challenges. The findings are challenged in grounds 2 and 3. Grounds 2 and 3 essentially recognise that if ground 1 succeeds, it would follow that the decision should be quashed, as the factual findings stem from the successful ground.

39 Finally, the Director General says the proposed ground proceeds on the basis that the alleged contravention was something other than that which was truly alleged in the proceedings, namely that direct contact with the employees was prohibited.

40 It is 'elementary' that a party is bound by the conduct of their case at trial: see Buss P and Murphy JA in ***Gold Valley Iron Pty Ltd (in liq) v Ops Screening & Crushing Equipment Pty Ltd*** [2022] WASCA 134 at [84]-[89] where the relevant authorities are collected and summarised. Only in the most exceptional circumstances will a party be allowed to raise a new argument on appeal which it failed to put during a hearing when it had an opportunity to do so.

41 The limited exceptions were described in ***Water Board v Moustakas*** [1988] HCA 12; (1988) 180 CLR 491 at [13]:

> …Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied. See ***Suttor v. Gundowda Pty. Ltd.*** [1950] HCA 35; (1950) 81 CLR 418, at p 438; ***University of Wollongong v. Metwally (No.2)*** [1985] HCA 28; (1985) 59 ALJR 481, at p 483; [1985] HCA 28; 60 ALR 68, at p 71; ***Coulton v. Holcombe*** [1986] HCA 33; (1986) 162 CLR 1, at pp 7-8; ***O'Brien v. Komesaroff*** [1982] HCA 33; (1982) 150 CLR 310, at p 319.

42 The question, then, is whether the breach that is assumed by amended ground 1 is a new point?

43 The relevant parts of the Originating Claim are paragraphs 8, 12, 13 and 16 which are set out below:

> 8. On 21 January 2021 the Respondent made arrangements with Ms Malkoc and Mr Petrovski to attend separate meetings on 22 January 2021 to receive a letter of outcome in respect to their allegations of a breach of discipline **without making the arrangements through the Claimant** as expected or required as their representative. (emphasis added)
>
> 12. Wherefore[sic], the Claimant alleges that the Respondent has contravened or failed to comply with clause 36A(4) the Award; namely to *recognise the union's representational capacity in all future dealings on that matter.* (original emphasis)
>
> 13. The matter was *discipline* as contemplated in clause 39A(1), and the breach was complete when the officer of the employing authority contacted the CSA's members to arrange meetings or an interviews without the CSA's knowledge. (original emphasis)
>
> 16. Clause 36A…does not prevent an employing authority from sending copies of correspondence or communications addressed to the Claimant to the Claimant's members at the same time.

44 A point may be a new point even if it is within the particulars or pleadings. The pleadings are not conclusive. To determine whether a new point is being raised on appeal, it is necessary to look to the actual conduct of the proceedings: ***Gold Valley Iron Pty Ltd*** at [87] citing ***Whisprun Pty Ltd v Dixon*** [2003] HCA 48; (2003) 77 ALJR 1598. Nevertheless, given how the claim was framed in the Originating Claim, it is difficult to accept the respondent's characterisation of the claim as 'truly' being that direct contact with the employees was prohibited. The Originating Claim expressly disavows that position.

45 The CSA's written submissions for the first instance hearing do contain a suggestion that the CSA was making a case that direct contact with the employees was prohibited. At paragraph 7, the submissions say:

> 7. The claimant states that the breach of the Award arose from the conduct of the respondent on the 21 and 22 of January 2022. **Through its direct correspondence with the members**; the prevention of attendance of the chosen representatives at meetings; requiring a face to face meeting with the members on the discipline matter; and not allowing discussion of the disciplinary process. (emphasis added)

46 However, the submissions continue at paragraphs 75 and 100:

> 75. **By not communicating directly with the representatives**, by not allowing time for the meeting to be rescheduled; and by requiring that the member sit in a meeting and be read a letter the respondent has shown a lack of recognition of the representative. (emphasis added)
>
> 100. **The representatives were not included in any invitation** to the meetings. Their representational capacity was therefore not recognised… (emphasis added)

47 In his written submissions for the first instance hearing, the Director General accused the CSA's written submissions of seeking to 'expand its claim of alleged contraventions through its written submissions' by alleging for the first time that direct contact with the employees was conduct that was in breach of cl 36A: see paragraphs 7-15 of the Respondent's Written Submissions. The Director General argued that the CSA should not be allowed to press such a claim.

48 In opening the CSA's case in the hearing at first instance, the CSA's representative characterised the relevant claim as follows:

> …We submit that the proper construction of "Represent" is that the industrial officer acts for the member and their attendance is equivalent to the attendance of the members. **Therefore, by not contacting the claimant's officers directly, the respondent failed to recognise the representation of the members…**

> It's therefore not necessary for the members to be contacted directly, as contact could and should be achieved through the representatives… (ts 5) (emphasis added)

49 In opening submissions, the CSA's representative used a combination of phrases to describe the conduct constituting the alleged breach, including 'direct correspondence with the members', 'not communicating directly with the representatives' and 'not including the representatives'. It is fair to say, as the learned Industrial Magistrate had picked up, the CSA's case was unclear about precisely what conduct was alleged to constitute the relevant breach.

50 Her Honour appropriately pressed the CSA on this point, which lead to the CSA saying, in its closing submissions:

> We submit that the correct instruction[sic] [construction] is that a representative being recognised means that when a discussion, meeting or investigation regarding a serious matter, such as discipline occurs, the representative is communicated with regarding the matter. Communication about the matter is delivered to the representative, or in the case of the email, that both parties are included in the email, and that meetings are scheduled with the availabilities of both parties. (ts 36)

51 Doing the best with the case that was presented, the learned Industrial Magistrate ultimately proceeded on the basis that the alleged contravention was 'by not directly informing the [CSA] about the meeting scheduled on 22 January 2021'. That was a fair summary of the CSA's case, within the parameters of what the respondent fairly ought to have appreciated was the case.

52 The Director General's counsel pointed out that paragraph 13 of the Originating Claim asserts that the relevant breach was complete 'when the officer of the employing authority contacted the CSA's members…'. He said this demonstrated that the contemplated breach could not have been a failure to correspond or communicate generally, but a failure to communicate at or before the time the members were contacted to arrange the meeting. During the hearing of the application to amend its grounds, the CSA confirmed that nothing different was being alleged or assumed by ground 1. But ground 1 is confined to the question of construction of the clause, not the facts that constitute the breach of it.

53 Having regard to the combination of the Originating Claim, written submissions and submissions at hearing, it cannot be said that the CSA's true point at first instance was that the direct contact with employees was prohibited by cl 36A(4). The point that is raised by ground 1 of the proposed amended grounds of appeal, which is a question of construction, was before the learned Industrial Magistrate. It is not a new point.

Ground 2 and Ground 3

54 Proposed amended ground 2 is as follows:

2. In dismissing alleged contravention (i) in matter M170 of 2021, the Industrial Magistrate erred in fact and law by finding, at paragraphs [34] to [36] of the reasons for decision, that the Respondent:

   i. ~~did not deny Ms Malkoc her~~ recognised the Appellant's representational capacity under clause 36A; and

   ii. otherwise complied with the obligation in clause 36A of the Award to recognise Ms Malkoc's nominated representative in all future dealings of the significant matter,

   despite having correctly found:

   iii. at paragraph [23] of the reasons for decision, that a meeting scheduled by an employer to discuss the outcome of an investigation into a disciplinary matter is clearly a "dealing" on that matter;

   iv. at paragraph [24] of the reasons for decision, that the invitation to such a meeting is also a "dealing" on the matter; and

   v. at paragraph [26] of the reasons for decision, the Respondent did not send the meeting invitation to Ms Malkoc's representative.

Particulars

A. Clause 36A provided officers involved in significant matters (e.g. discipline and performance management) with a 'right to representation': ***Clause 36A(2)***.

B. An officer's right to representation included advocacy: ***Clause 36A(2)***.

C. While the presence of an officer's representative was not required at every meeting between an officer and the Respondent, the Respondent was required to:

   i. recognise the officer's representative;

   ii. recognise the representational capacity of the ~~Respondent's~~ Appellants representative in all future dealings on that matter;

   iii. permit the officer's representative to attend all meetings involving significant matters;

   iv. allow the officer's representative to advocate on behalf of the officer at those meetings; and

   v. make reasonable efforts to avoid unnecessary delays: ***Clause 36A(3), (4), (5)***.

D. Given the ~~officer's right to representation~~ Appellants representational capacity and the above express obligations on the Respondent in clause 36A, it was erroneous for the Industrial Magistrate to conclude that clause 36A did not require the Respondent to correspond with the officer's representative about planning meetings relating to significant matters involving the officer.

E. The Industrial Magistrate's error in law consequentially caused it to make an error in fact by finding that the Respondent did not contravene clause 36A.

55 Ground 2 concerns how the meeting about the first employee's disciplinary process outcome was arranged. Ground 3 is substantively the same as ground 2, except that it concerns the factual findings related to the second employee.

56 These grounds are tied to ground 1, in that they challenge the factual findings made in the learned Industrial Magistrate's application of the facts to her Honour's construction of cl 36A(4).

57 Despite having four goes at drafting these grounds, the proposed amendments still attribute to the Industrial Magistrate findings that were not made. However, these are just obvious errors in drafting. They do not suggest a misconceived reading of the Industrial Magistrate's reasons. For example, reference is made to a finding that the Respondent did not send the meeting invitation to 'Mr Tebbutt's representative'. It is obviously intended this paragraph refer to Mr Tebbutt, the CSA officer, not Mr Tebbutt's representative.

58 As I have said, the grounds are really an extension of ground 1. The relevant factual findings are:

(a) that the Director General did not communicate with the CSA directly in order to arrange the meetings that occurred on 22 January 2021; and

(b) the Director General did tell the employees that they were permitted to have a union representative with them at the meeting.

59 The grounds do not challenge these two key factual findings. Rather, the grounds are simply that if the learned Industrial Magistrate erred in her Honour's construction of cl 36A(4) as alleged in ground 1, then the finding that cl 36A(4) was complied with was also wrong on the facts.

60 Perhaps the grounds could be more succinctly and clearly articulated. But they are decipherable, understandable and give fair notice of what the alleged errors are.

Orders

61 The proposed amended orders sought are:

4. The Appellant seeks the following orders:

i. That the Industrial Magistrate's decision to dismiss contraventions (i) and (iii) is varied as follows:

1. The Full Bench orders that the Respondent contravened clause 36A(4) of the Award in respect of Ms Malkoc by not directly informing the Appellant about the meeting scheduled on 22 January 2021.

2. The Full Bench also orders that the Respondent contravened clause 36A(4) of the Award in respect of Mr Petrovski by not directly informing the Appellant about the meeting scheduled on 22 January 2021.

ii. Alternative to paragraph 4.i, the Industrial Magistrate's decision to dismiss alleged contraventions (i) and (iii) is quashed.

iii. And that the matter is remitted to the Industrial Magistrate's Court for further hearing and determination on the issue of remedy and penalties in relation to contraventions (i) and (iii).

62 The Director General argues that the orders in 4(i) relate to contraventions that were not the subject of the claim at first instance and so are not available. Specifically, that the claim at first instance was that the respondent's breach occurred when the CSA was not directly informed about the meeting scheduled on 22 January 2021 concurrently with when the employees were informed. The orders, however, assume the breach was not directly informing the CSA about the meeting in a more general sense.

63 Although the orders sought in paragraph 4 permit the possibility of a wider range of conduct constituting the breach, the Full Bench and the respondent have a sufficiently clear understanding of the CSA's case from the grounds which precede the orders sought, together with the CSA's assurances that the CSA is not seeking to broaden its case on appeal beyond that which was advanced at first instance.

Consequences to the CSA if the amendments are not allowed and prejudice to the respondent

64 The CSA considers the issues that are raised in this appeal are of general importance in relation to the CSA and its members. It concerns members' representational rights; such rights having been negotiated for inclusion in an enforceable industrial instrument.

65 The Director General agrees that the correct construction of cl 36A is an issue of importance generally for the parties to the Award, including employers who are not parties to the appeal. But he says that because of the unclear way the case was run at first instance, and confusion over the CSA's position, this appeal is not an appropriate vehicle for clarifying these important issues. The Full Bench agrees. The proposed amended grounds of appeal necessarily have a narrow focus because of how the matter was run at first instance. Further, two of the three grounds are particular to the facts.

66 Nevertheless, disallowing the amendments will prevent the CSA from advancing arguable grounds of appeal.

67 The Director General did not suggest that it would suffer particular prejudice if the amendments were allowed. However, his counsel suggested that the CSA was in dispute with other employer parties to the Award about clause 36A, and that delays brought about by amendments to the grounds, particularly if the grounds remained defective, would prolong the proceedings and create general uncertainty.

68 We are not aware of any specific requirement for the Commission to consider the interests of non-parties in determining whether to allow amendments to the grounds of appeal. Even if it is required to consider such interests, the interests of ensuring the issues are narrowed in this appeal counterbalance that consideration.

69 If the CSA is required to run this appeal on the basis of the grounds as originally filed, this will likely cause it, and the Full Bench, difficulty in identifying the real issues. It would also likely cause time to be wasted on non-issues.

70 For the above reasons, the Full Bench will give the CSA permission to amend the grounds of appeal in accordance with the application dated 23 August 2023 as amended on 22 September 2023.

Disposition and programming orders

71 The orders will be:

(a) The appellant is granted leave to amend the grounds of appeal in accordance with the Minute of Proposed Further Amended Grounds of Appeal dated 22 September 2023.

(b) The appeal be listed for hearing on a date to be fixed.

2023 WAIRC 00794

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATE IN MATTER NUMBER M 170/2021 GIVEN ON 22 MARCH 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-v-
	DIRECTOR GENERAL AS THE EMPLOYING AUTHORITY, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	FULL BENCH
	SENIOR COMMISSIONER R COSENTINO
	COMMISSIONER T EMMANUEL
	COMMISSIONER C TSANG
DATE	THURSDAY, 5 OCTOBER 2023
FILE NO/S	FBA 1 OF 2023
CITATION NO.	2023 WAIRC 00794

Result	Order issued
Representation	
Appellant	Ms D Larson of counsel and Ms J Moore of counsel
Respondent	Mr J Carroll of counsel

Order

HAVING heard from Ms D Larson of counsel and Ms J Moore of counsel on behalf of the appellant, and Mr J Carroll of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the appellant is granted leave to amend the grounds of appeal in accordance with the Minute of Proposed Further Amended Grounds of Appeal dated 22 September 2023.

2. THAT the appeal be listed for hearing on a date to be fixed.

By the Full Bench

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

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FULL BENCH—Matters referred under Section 27—

2023 WAIRC 00787

QUESTIONS OF LAW REFERRED TO FULL BENCH
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00787
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
HEARD	:	WEDNESDAY, 28 JUNE 2023, TUESDAY, 8 AUGUST 2023, WEDNESDAY, 16 AUGUST 2023
DELIVERED	:	TUESDAY, 3 OCTOBER 2023
FILE NO.	:	FBM 1 OF 2023
BETWEEN	:	CITY OF COCKBURN Applicant AND THE WESTERN AUSTRALIA MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES AND THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION Respondents MINISTER FOR INDUSTRIAL RELATIONS, THE WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS Intervenors

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Catchwords	:	Industrial law (WA) - Questions of law - Referral to the Full Bench - Operation of the *Industrial Relations Act 1979* (WA) - Relationship between awards and industrial agreements - Statutory interpretation - Principles applied - Operation and effect of s 41(9) of the *Act* - Legislative history of s 41 of the *Act* - Inconsistency between an award and an agreement - Agreement prevails - Whether the registration of Individual Flexibility Agreements clauses are contrary to and inconsistent with the *Act* - Individual Flexibility Agreements clauses invalid and of no effect - Whether the Commission can require that an agreement be varied under s 41(3) of the *Act* before registration - Obligation on Commission to register an agreement imposed under s 41(2) of the *Act*
Legislation	:	*Acts Amendment and Repeal (Industrial Relations) Act (No.2) 1984* (WA) s 26 *Fair Work Act 2009* (Cth) s 57(1); s 144; s 176(1)(b)(i); s 176(3); s 183; s 185; s 186; s 201(2); s 202 *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Cth) *Fair Work (Registered Organisations) Act 2009* (Cth) *Fair Work Regulations 2009* (Cth) *Fair Work (State Declarations – Employers not to be national system employers) Endorsement 2022 No. 1* (Cth) *Industrial Arbitration Act 1979-1982* (WA) *Industrial Relations Act 1979* (WA) Part II Division 2; Part II Division 2A; Part II Division 2B; Part II Division 3; Part II Division 4; Part 2AA; Part VID Division 2; Part VID Division 6; s 6; s 6(ac); s 6(ad); s 6(ae); s 6(ag); s 6(ca); s 6(d); s 23; s 27(1)(u); s 27(1)(k); s 29(1); s 30; s 32(2); s 37; s 40; s 41; s 41(1); s 41(2); s 41(3); s 41(4); s 41(6); s 41(9); s 41A; s 40B; s 42; s 43(1); s 44; s 46; s 49N; s 51; s 57(1); s 72A; s 80A(2); s 80BB; s 80BB(2); s 80BB(4); s 80BG; s 80BG(2); s 80BJ; s 80BK; s 80BT, s 83; s 97UF; s 114 *Industrial Relations Act 1988* (Cth) s 152 *Industrial Relations Amendment Act 1993* (WA) s 13 *Industrial Relations (General) Regulations 1997* (WA) reg 7; reg 8; reg 8(2); schedule 4 *Industrial Relations Legislation Amendment Act 2021* (WA) *Industrial Relations Regulations (Consequential Amendment) Regulations 2022* (WA) Part 4 *Interpretation Act 1984* (WA) s 18 *Labour Relations Reform Act 2002* (WA) s 131; s 132

Result	:	Order issued
Representation:		
Counsel:		
Applicant	:	Ms H Millar of counsel and with her Ms K Groves of counsel
WALGA	:	Ms R Miller as agent
WASU	:	Mr C Fogliani of counsel
LGRCEU	:	Mr K Trainer as agent
Intervenors		
Minister	:	Mr R Andretich of counsel
CFMEUW	:	Mr TJ Dixon of counsel and with him Mr J Nicholas of counsel
Solicitors:		
Applicant	:	Minter Ellison
WASU	:	Fogliani.Law
Intervenors		
Minister	:	State Solicitor's Office
CFMEUW	:	Nicholas Legal

Case(s) referred to in reasons:

AFMEPKIU v Electrolux Home Products Pty Ltd (2002) 115 IR 102

ALHMWU v Ngala Family Resource Centre (1996) 76 WAIG 1658

Amalgamated Collieries of WA Ltd v True (1938) 59 CLR 417 at 423

Amalgamation of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Food Preservers' Union of Western Australia Union of Workers [2016] WAIRC 00966; (2017) 97 WAIG 148

Australian Conservation Foundation v Commonwealth [1980] HCA 53; 146 CLR 493

Australian Workers Union, West Australian Branch, Industrial Union of Workers v Life Be In It (1994) 74 WAIG 2342

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union Western Australian Branch [2002] WASCA 355; (2002) 83 WAIG 208

City of Rockingham Outside Workforce Enterprise Agreement 2020 [2021] FWCA 7052

Confederation of Western Australian Industry (Inc) v West Australian Timber Industry Industrial Union of Workers, South-west Land Division (1990) 71 WAIG 15

Construction, Forestry, Mining and Energy Union of Workers v Sanwell Pty Ltd and the Chamber of Commerce and Industry of Western Australia [2004] WAIRC 10947; (2004) 84 WAIG 727

Electrolux Home Products v Australian Workers Union [2004] HCA 40; 221 CLR 309

Hanssen Pty Ltd v Construction, Forestry, Mining & Energy Union [2004] 84 WAIG 694

Hungry Jacks Pty Limited and Ors v Wilkins (1991) 76 WAIG 1751

John Holland Pty Ltd v Victorian Workcover Authority [2009] HCA 45; 239 CLR 518

Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66 at 73

Minister for Labour v Como Investments Pty Ltd & Ors (1990) 70 WAIG 3539

New South Wales v Commonwealth [2006] HCA 52; (2006) 229 CLR 1

Ngala Family Resource Centre v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Division (1996) 77 WAIG 2551

Onus v Alcoa of Australia Ltd [1981] HCA 50; (1981) 149 CLR 27

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2021] WASCA 208; (2021) 101 WAIG 1457

Re Ludeke; Ex parte Customs Officers Association of Australia, Fourth Division (1985) 155 CLR 513

Regional Express Holdings Ltd v Australian Federation of Air Pilots [2016] FCAFC 147

Russio v Aiello [2003] HCA 53; (2003) 215 CLR 643

The Australian Bank Employees Union v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch and Ors (1990) 70 WAIG 2086

Unions NSW v New South Wales [2023] HCA 4

Western Australian Prison Officers Union of Workers (WAPOU) v Minister for Corrective Services [2022] WAIRC 00636; (2022) 102 WAIG 1188

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

Reasons for Decision

FULL BENCH:

Background

1 On 1 January 2023, the local government industry transitioned from the national industrial relations system to the State industrial relations system, as a consequence of the *Industrial Relations Legislation Amendment Act 2021* (WA), the *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Cth) and the *Fair Work (State Declarations – Employers not to be national system employers) Endorsement 2022 No. 1)* (Cth). Additionally, complementary State Regulations, in Part 4 of the *Industrial Relations Regulations (Consequential Amendment) Regulations 2022* (WA), amended the *Industrial Relations (General) Regulations 1997* (WA) to declare, for the purposes of s 80A(2) of the *Industrial Relations Act 1979* (WA), that local government employers are not to be national system employers under the *Fair Work Act 2009* (Cth).

2 The effect of the new Part 2AA of the *Act*, in particular s 80BB, is to create an industrial instrument, known as a 'new State instrument', where immediately prior to the commencement day, an instrument made under the *FW Act*, applied to 'a declared employer and a declared employee'. The latter are employers and employees in local government, subject to the above transitional instruments.

3 Upon commencement of the legislation, an award or enterprise agreement made under the *FW Act* became, under s 80BB(2), an 'industrial agreement', described as a new State instrument and 'applied' to a declared employer and employees. Section 80BB is in the following terms:

> **80BB. New State instruments**
>
> (1) This section applies —
>
> (a) to the extent section 80BA does not provide for a declared employee of a declared employer; and
>
> (b) if, immediately before the relevant day, a federal industrial instrument (the ***old federal instrument***) applies to, or purports to apply to, the declared employee.
>
> (2) On the relevant day, an industrial agreement (the ***new State instrument***) applies to the declared employer and declared employees.
>
> (3) The new State instrument is taken —
>
> (a) to have been registered under this Act on the relevant day; and
>
> (b) except as provided in this section or section 80BC, to have the same terms as the old federal instrument including those terms as added to or modified by any of the following —
>
> (i) terms of a federal award incorporated by the old federal instrument;
>
> (ii) orders of a federal industrial authority;
>
> (iii) another instrument under the national fair work legislation or the repealed Workplace Act;
>
> and
>
> (c) to have a nominal expiry date that is the earlier of the following —
>
> (i) a day that is 2 years after the relevant day;
>
> (ii) the day that, immediately before the relevant day, was the nominal expiry day of the old federal instrument.
>
> (4) This Act applies in relation to the new State instrument subject to any modifications or exclusions prescribed by regulations for this subsection.
>
> (5) The new State instrument applies except as provided in the MCE Act.

4 Additionally, as a part of the statutory scheme to give effect to the transition, by s 80BG, federal organisations referred to in a new State instrument are taken to be a reference to a State organisation of which the federal organisation is the federal counterpart body. If no federal counterpart body exists, the federal organisation is taken to be a State organisation for the purposes of representing the industrial interests of declared employees employed by a declared employer.

5 Additionally, for the purposes of s 80BB(4) of the *Act*, a new reg 8 of the *General Regulations* was made in the following terms:

> **8. Modification of application of Act to new State instrument (Act s. 80BB(4))**
>
> (1) This regulation applies for the period of 2 years beginning on 1 January 2023.
>
> (2) For the purposes of section 80BB(4) of the Act, while the new State instrument is in force an award does not apply to the declared employer and declared employees, unless the new State instrument provides otherwise.

6 In accordance with the above scheme, the *City of Cockburn Enterprise Agreement 2019 – 2022* made under the *FW Act*, became a new State instrument on 1 January 2023. By s 80BB(2) of the *Act*, this enterprise agreement is taken to be an industrial agreement registered under s 41 of the *Act*.

7 The parties have negotiated a new agreement, the *City of Cockburn Enterprise Agreement 2022* (*Agreement*), and sought to have it registered as an industrial agreement under s 41 of the *Act*. As such, upon registration, the new State instrument will cease to have effect. When registered, the *Agreement* will be made as an industrial agreement under Division 2B – Industrial agreements and that Division will apply to it accordingly.

8 The making, registration and effect of industrial agreements is dealt with in s 41 of the *Act*. It is as follows:

41. Industrial agreements, making, registration and effect of

(1) An agreement with respect to any industrial matter or for the prevention or resolution under this Act of any related disputes, disagreements, or questions may be made between an organisation or association of employees and any employer or organisation or association of employers.

(1a) An agreement may apply to a single enterprise or more than a single enterprise.

(1b) For the purposes of subsection (1a) an agreement applies to more than a single enterprise if it applies to —

(a) more than one business, project or undertaking; or

(b) the activities carried on by more than one public authority.

(2) Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission must register the agreement as an industrial agreement.

(3) Before registering an industrial agreement the Commission may require the parties to effect such variation as the Commission considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties.

(4) An industrial agreement extends to and binds —

(a) all employees who are employed —

(i) in any calling mentioned in the industrial agreement in the industry or industries to which the industrial agreement applies; and

(ii) by an employer who is —

(I) a party to the industrial agreement; or

(II) a member of an organisation of employers that is a party to the industrial agreement or that is a member of an association of employers that is a party to the industrial agreement;

and

(b) all employers referred to in paragraph (a)(ii),

and no other employee or employer, and its scope must be expressly so limited in the industrial agreement.

(5) An industrial agreement operates —

(a) in the area specified in the agreement; and

(b) for the term specified in the agreement.

(6) Notwithstanding the expiry of the term of an industrial agreement, it continues in force in respect of all parties to the agreement, except those who retire from the agreement, until a new agreement or an award in substitution for the first-mentioned agreement has been made.

(7) At any time after, or not more than 30 days before, the expiry of an industrial agreement any party to the agreement may file in the office of the Registrar a notice in the approved form signifying the party's intention to retire from the agreement at the expiration of 30 days from the date of the filing, and, on the expiration of that period, the party ceases to be a party to the agreement.

(8) When a new industrial agreement is made and registered, or an award or enterprise order is made, in substitution for an industrial agreement (the first agreement), the first agreement is taken to be cancelled, except to the extent that the new industrial agreement, award or order saves the provisions of the first agreement.

(9) To the extent that an industrial agreement is contrary to or inconsistent with an award, the industrial agreement prevails unless the agreement expressly provides otherwise.

9 The registration of an industrial agreement is subject to only a few conditions or limitations under the *Act*, mainly found in s 41A, as follows:

41A. Which industrial agreements must not be registered under s. 41

(1) The Commission must not under section 41 register an agreement as an industrial agreement unless the agreement —

(a) specifies a nominal expiry date that is no later than 3 years after the date on which the agreement will come into operation; and

(b) includes any provision specified in relation to that agreement by an order referred to in section 42G; and

(c) includes an estimate of the number of employees who will be bound by the agreement upon registration.

(2) The Commission must not under section 41 register an agreement as an industrial agreement to which an organisation or association of employees is a party, unless the employees who will be bound by the agreement upon registration are members of, or eligible to be members of, that organisation or association.

10 There are other provisions of the *Act* that apply to certain subject matters contained in an industrial agreement registered under the *Act*, but they are not material for present purposes.

11 Whilst the *Agreement* is before the Commission for registration, two provisions of it are controversial. With the consent of the Chief Commissioner, these two clauses of the *Agreement* are the subject of a referral of questions of law to the Full Bench under s 27(1)(u) of the *Act*.

Questions of law referred

12 The questions of law referred to the Full Bench, as amended, are in the following terms:

Amended questions of law referred to the Full Bench

(1) The Commission has before it an application to register under s 41 of the Act the City of Cockburn Enterprise Agreement 2022. Two clauses are in issue in this matter:

(a) Clause 5 – Operation of the Agreement which is in the following terms:

5. Operation of the Agreement

1. This Agreement excludes the Municipal Employees' (Western Australia) Award 2021, the Local Government Officers' (Western Australia) Award 2021 and any other award made under the Industrial Relations Act 1979 (WA) (Award) that otherwise extends to and binds the Employees and Employer to whom this Agreement applies.

2. Other than statutory entitlements (for instances those contained in the MCE Act) this Agreement is intended to set out all of the Employees' terms and conditions of employment. To the extent that an Award provides for an entitlement that is different to or not otherwise referred to in this Agreement (including where this Agreement is silent on a matter provided for in an Award), any such Award entitlement will be inconsistent with this Agreement and this Agreement shall prevail.

3. It is agreed that for the life of this Agreement there shall be no extra claims outside the Agreement.

4. This Agreement will be read and interpreted in conjunction with the MCE Act. Where there is an inconsistency between this Agreement and the MCE Act, and the MCE Act provides a greater benefit, the MCE Act provisions will apply to the extent of the inconsistency.

(b) Clause 6 - Individual Flexibility Arrangements which is in the following terms:

6. Individual Flexibility Arrangements

x1. The Employer and an Employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

a. the arrangement deals with one or more of the following matters:

i. arrangements about when work is performed.

ii. overtime rates.

iii. penalty rates.

iv. allowances.

v. leave loading; and

b. the arrangement meets the genuine needs of the Employer and Employee in relation to one or more of the matters mentioned in paragraph (a); and

c. the arrangement is genuinely agreed to by the Employer and Employee.

2. The Employer must ensure that the terms of the individual flexibility arrangement result in the Employee being better off overall than the employee would be if no arrangement was made.

3. The employer must ensure that the individual flexibility arrangement:

a. is in writing; and

b. includes the name of the Employer and Employee; and

c. is signed by the Employer and Employee and if the employee is under 18 years of age, signed by a parent or guardian of the Employee; and

d. includes details of:

i. the terms of the enterprise agreement that will be varied by the arrangement; and

ii. how the arrangement will vary the effect of the terms; and

iii. how the Employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

e. states the day on which the arrangement commences.

4. The Employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

5. The Employer or Employee may terminate the individual flexibility arrangement:

a. by giving no less than 28 days written notice to the other party to the arrangement; or

b. if the Employer and Employee agree in writing-at any time.

(2) The questions posed for consideration by the Full Bench are:

(a) Would the registration of the Agreement including clause 5 – Operation of the Agreement, in particular cl 5.2, be contrary to the Act?

(b) Would the registration of the Agreement including clause 6 – Individual Flexibility Arrangements, be contrary to the Act?

(c) Would the above clauses in the Agreement, if registered, be invalid and of no effect?

(d) Can the Commission, before registering the Agreement under s 41(2) of the Act, require the parties to effect a variation for a purpose other than 'giving clear expression to the true intention of the parties' under s 41(3) of the Act?

Intervention application

13 The parties to the referral are the employer, the City of Cockburn, and the two union parties to the proposed industrial agreement to be registered, the Western Australian Municipal, Administrative, Clerical and Services Union of Employees and the Local Government, Racing and Cemeteries Employees Union. Additionally, the Western Australian Local Government Association, representing local government employers, was granted leave to intervene under s 27(1)(k) of the *Act*. As the questions raise matters concerning the proper application of provisions of the *Act* in relation to the registration of industrial agreements in this jurisdiction, the Minister sought and was granted leave to intervene under s 30 of the *Act*.

14 After the referral of the questions to the Full Bench, but prior to the hearing of the matter, the Construction, Forestry, Mining and Energy Union of Workers, an organisation registered under the *Act*, also sought leave to intervene. The grounds of its application, whilst quite lengthy, are as follows:

Grounds and Reasons for Intervention

1. The CFMEUW seeks leave to intervene in order to make submissions in FBM 1/2023.

2. The CFMEUW has acted as expeditiously as possible in making this application to intervene. The Secretary of the CFMEUW only became aware of each of:

(a) Matter FBM 1/2023;

(b) The Directions issued by the Full Bench in FBM 1 /2023 on 29 June 2023; and

(c) The Order granting the Minister for Industrial Relations and the Western Australian Local Government Association leave to intervene in FBM 1/2023 dated 18 July 2023, on the afternoon of 19 July 2023.

3. In the time available, the CFMEUW has not been able to view the file in matter FBM 1/2023, however, it understands that the issues in the matter relate to clauses in the proposed s.41 industrial agreement that variously seek to:

(a) exclude the application of State awards so that the enterprise agreement can be read as a comprehensive stand-alone document **(award offset clause).**

(b) enable an employer and an employee to agree to vary the application of term of an enterprise agreement - namely an individual flexibility arrangement clause **(IF A clause).**

4. The CFMWUW understands that the issues as identified have given rise to the following questions of law referred to the Full Bench:

1. Would the registration of the City of Cockburn Enterprise Agreement 2022 including the award offset clause be contrary to the *Industrial Relations Act 1979?* **(Question 1).**

2. Would the registration of the Agreement including the IF A clause be contrary to the IR Act? **(Question 2).**

3. Would these clauses in the Agreement, if registered, be invalid and of no effect? **(Question 3).**

5. The CFMEUW is a respondent to an application made by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees under s.72A of the Act in relation to bargaining for the new City of Rockingham s.41 industrial agreement in Matter CICS 5 of 2023. In that application, the CFMEUW claims that it has both members in the relevant workforce of the City of Rockingham, and that it is entitled under its Rules to represent the interests of its members in a number of classifications that will be covered by the proposed s.41 industrial agreement.

6. The CFMEUW also has members in many other Local Government workforces in Western Australia.

7. The bargaining for the new City of Rockingham industrial agreement was on foot immediately prior to the time that FBM 1/2023 was listed for hearing. The extant City of Rockingham agreement (AG2021/8671) was made under the *Fair Work Act 2009* (Cth): ***City of Rockingham Outside Workforce Enterprise Agreement 2020*** [2021] FWCA 7052. Both the extant industrial agreement (in clauses 3.6 and 5), and the proposed replacement agreement from the City of Rockingham (clauses 4 and 6) contain:

   (a) An award offset clause;

   (b) An IFA clause.

8. Given the:

   (a) Industry-wide implications of the award offset clauses and IFA clauses in Local Government s.41 industrial agreements; and

   (b) Specific implications for bargaining in relation to, and the carrying over of, an award offset clause and an IFA clause in the new City of Rockingham s.41 industrial agreement, there is a real likelihood that the CFMEUW' s interests and those of its members will be affected by any decision made in FBM 1/2023.

9. The CFMEUW is presently unaware of the positions taken by any of the parties or intervenors in FBM 1/2023 on the question of law posited, or whether there will be an active contradictor on all issues. The CFMEUW presently intends, subject to a grant of leave to intervene, to submit that:

   1. In respect of Questions 1 and 3: An award offset clause:

      (a) would be contrary to the IR Act, including s.41(9) which recognises the continued application of State Awards subject to any inconsistency with the terms of a s.41 industrial agreement; and (b) which in effect seeks to 'cover the field' to exclude the operation of State Award would not have that effect without more as it is a mere statement of intent of the parties that the substantive provisions of the Agreement itself must be capable of supporting: *John Holland Pty Ltd v Victorian Workcover Authority* [2009] HCA 45; 239 CLR 518 at p.526ff, [18], [20].

   2. In respect of Questions 2 and 3: An IFA clause would be invalid and of no effect by reason of being inconsistent with the legislative regime which finds expression in ss.6(ad) and 41, and Part VID of the Act including provisions that provide for:

      (a) the prevention of the making of an Employer-Employee Agreement **(EEA)** during the term of a s.41 industrial agreement (s.97UF);

      (b) the appointment and regulation of bargaining agents for EEA negotiations (ss.97UJ, 97UK);

      (c) EEA formalities (ss.97UL to 97UO); and

      (d) the application of the no-disadvantage test to EEAs (ss.97VS, 97VT).

10. In addition to the CFMEUW's position in respect of Questions 1 and 2, the CFMEUW would make submissions relevant to all three Questions on the issue of whether a s.41 industrial agreement containing an award offset clause and IFA clause is capable of registration in light of:

    (a) The effect these clauses have in circumventing and derogating from the sections of the Act that provide protection and rights to employees through award conditions and the primacy given to collective bargaining.

    (b) The proper construction and application of s.41 of the Act which relevantly permits industrial agreements to be made with respect to:

       (i) any "industrial matter" (as defined in s.7); or

       (ii) the "prevention or resolution" of industrial disputes.

    (c) The decision of Full Bench in *CFMEUW v Sanwell Pty Ltd* [2004] WAIRComm 10947; (2004) 84 WAIG 727 esp. at [138]-[146] and the reliance placed by the Full Bench (at [142]-[146]) on the decision of the Full Court in *AFMEP &KIU v Electrolux Home Products Pty Ltd* (2002) 115 IR 102 given that the Full Court decision was subsequently overruled in *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; 221 CLR 309 with the effect that an agreement that contained terms that did not pertain to that relationship of employer and employee could not be certified under federal industrial legislation.

11. For these reasons, the CFMEUW should be granted leave to intervene and to make submissions as foreshadowed.

15 The application by the CFMEUW was opposed by the other parties and WALGA. The Minister neither consented to nor opposed the application. Whilst the Full Bench originally proposed that the intervention application be dealt with on the papers by written submissions, the WASU sought to be heard and the matter was listed for hearing on 8 August 2023.

Mr Buchan's affidavit

16 In support of its application for leave to intervene, the CFMEUW filed an affidavit of Michael John Buchan. Mr Buchan is the State Secretary of the CFMEUW and the Secretary of the WA Branch of the Construction and General Division of the CFMMEU, registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

17 Mr Buchan testified that on 19 July 2023 he became aware of these proceedings and the various procedural directions and orders that had been made. He was informed of this by the union lawyer, Mr Catania. That afternoon, Mr Buchan instructed Mr Catania to brief the union solicitors to make an application for leave to intervene in these proceedings and attested to the truth of the grounds filed in support of the application, set out above. Mr Buchan also referred to becoming aware of information contained on the WALGA website, which referred to the 'industry wide' ramifications of the current proceedings, across the local government sector.

18 Mr Buchan also said that the union's counterpart federal body, the Construction and General Division of the CFMMEU, is party to a number of industrial agreements in the local government sector, which he set out in annexure B to his affidavit. He understood that those agreements have now become new State instruments. Mr Buchan also testified that the union has members in the Western Australian local government sector, including those parties to the agreements set out in annexure B. In this respect, Mr Buchan referred to some 20 members employed by the City of Wanneroo under the *City of Wanneroo Asset Operations Enterprise Agreement 2020*, employed in various building trades classifications. The union is a named party to this agreement. Additionally, he said there are 10 members employed under the *City of Perth Outside Workforce Enterprise Bargaining Agreement 2020*, in various building trades classifications, and, again, the union is a named party to that agreement.

19 Mr Buchan testified that the classifications involved as specified under these local government agreements, include carpenters, plant operators, painters, signwriters, graffiti removalists, glaziers, plasterers, bricklayers, stoneworkers and 'infrastructure tradespersons' engaged in parks operations.

20 In addition to the above, Mr Buchan said that whilst not a party to the relevant agreement, the union has members employed by some local governments, and cited the City of Joondalup as an example. It was also Mr Buchan's evidence that the CFMEUW intends to engage in bargaining in relation to new local government industrial agreements. Specifically concerning the City of Rockingham, Mr Buchan said that the union has been and remains involved in bargaining for the new agreement. He referred to assigning an organiser, Mr Mackrell, for this purpose. Mr Mackrell informed Mr Buchan that he attends meetings for the negotiation of the new agreement and the union also has two bargaining representatives on the bargaining committee, being Mr Carr and Mr Brownlie, who are both employed by the City. Mr Carr, who is a painter, was the employee representative signatory to the *City of Rockingham Outside Workforce Agreement 2020*.

Summons

21 In response to the CFMEUW application, the WASU issued a summons to produce to Mr Buchan, for the production of a range of documents in relation to the involvement of the CFMEUW in bargaining with the City of Rockingham for a new industrial agreement. The summons also sought information as to CFMEUW membership in the local government sector as at 28 July 2023, alternatively, CFMEUW membership records for members employed in local government. Additionally, the summons sought the production of email exchanges between Mr Buchan and the CFMEUW industrial officer Mr Singh, in relation to these proceedings. The WASU also requested Mr Buchan's attendance for the purposes of cross-examination on his affidavit.

Application to set aside summons

22 In response to the WASU summons, the CFMEUW filed an application that the summons be set aside under s 32(2) of the *Act*. The grounds in support of the application to set aside the summons were as follows (footnotes omitted):

> **B. Grounds**
>
> ***Background***
>
> 2. The Full Bench has listed four questions referred to it under s.27(1)(u) of the Act in FBM 1 of 2023 for hearing on 16 August 2023.
>
> 3. On 20 July 2023, the CFMEUW applied to intervene in FBM 1 of 2023.
>
> 4. The CFMEUW's application to intervene has been opposed by the Applicant (City of Cockburn), the Western Australian Municipal, Administrative, Clerical and Services Union of Employees (**WASU)**, and the LGRCEU. Submissions were received by those parties on 25 and 26 July 2023, together with evidence filed by the LGRCEU.
>
> 5. The CFMEUW filed its submissions, together with an affidavit sworn by Mr Buchan, on 28 July 2023 in support of its application to intervene.
>
> 6. The WASU sought to be heard rather than have the issue of intervention determined on the papers. The CFMEUW's application to intervene was accordingly listed for hearing on 8 August 2023.
>
> 7. At 9:30am on 7 August 2023, whilst Mr Buchan was meeting with the Secretary of the WASU at the offices of UnionsWA in order to mediate an alleged demarcation dispute (CIC5 of 2023), the Secretary of the WASU served Mr Buchan with a witness summons dated 4 August 2023 (**Summons**).

8. The Summons seeks the production of various classes of documents. It does not seek that Mr Buchan appear to give oral evidence.

Reasons for orders sought

9. The onus is on the party who issued the Summons [sic] show cause why that person should appear and answer the terms of the Summons.

10. The Summons will serve to unnecessary complicate an interlocutory procedure that is capable of determination on the materials before the Commission.

11. A key principle of case management in the Commission is the reduction of hearing times and the speedy and inexpensive determination of proceedings: sections 22B, 27(1)(ha), 27(1)(hb) of the Act; *cf* Regulations 32A, 34 and 39(2) of the Regulations; Practice Note 1 of 2023 at [8]-[9].

12. In dealing with an interlocutory application, the Commission is not finally deciding any factual or legal aspect of the substantive controversy before it; and it is inappropriate to try to resolve conflicts of evidence on the affidavits before it.

13. The apparent purpose of the five categories of documents sought in the Summons is to canvass the matters in Mr Buchan's affidavit. That should not be permitted on an interlocutory application of this nature. Neither should the WASU be permitted to Summons documents in these proceedings to canvass matters in issue in CIC5 of 2023.

14. The documents sought could not reasonably assist the Commission on the straightforward question of whether the CFMEUW has a sufficient interest to intervene. The Commission, when making its initial Directions, evidently considered the issue was capable of determination on written submissions alone.

15. The CFMEUW has submitted that the question of sufficient interest to intervene can be determined without evidence of, or reliance upon, actual membership. The fact it is party to relevant agreements and is involved in bargaining for new agreements is sufficient.

16. WASU seeks orders in CIC5 of 2023 that the WASU "has the right, to the exclusion of" the CFMEUW to "represent the industrial interests of all outside employees"; and that:

> *The Construction, Forestry, Mining and Energy Union of Workers does not have the right to represent under the Industrial Relations Act 1979 (WA) the industrial interests of outside employees employed in the enterprise of the City of Rockingham who are eligible for membership of the organisation.*

17. The WASU's application under s.72A necessarily assumes that the CFMEUW has current eligibility to enrol relevant members under its Rules. That is the *status quo*, and it the CFMEUW's extant constitutional coverage is sufficient to satisfy the sufficient interest test.

18. Accordingly, the documents sought in:

    (a) Categories 1 and 2 of the Summons – which apparently go to whether the CFMEU is involved in bargaining for any Local Government industrial agreements – a matter conceded by the LGRCEU in its materials;

    (b) Categories 3 to 5 of the Summons – which apparently go to the issue of whether the CFMEUW has members employed by any Local Government employer – also a matter conceded by the LGRCEU in its materials, would not assist the Commission on the question of intervention.

19. Additionally, Mr Buchan's affidavit was served some 10 days ago on 28 July 2023. The unexplained delay has left a very short time available for Mr Buchan to otherwise compile the materials and produce them before 8 August 2023 such as to also render the Summons oppressive.

20. For all of these reasons, the Summons for production should be set aside. The orthodox practice is to determine interlocutory questions concerning intervention on the materials filed. It would not be "just" in those circumstances to order that the Summons be answered: ss.26(1)(a) and 27(1)(o) of the Act.

23 At the hearing of the interlocutory application by the CFMEUW for leave to intervene, the WASU contended that it wished to cross-examine Mr Buchan on his affidavit and press the summons for production of documents. The WASU sought the production of documents as to when the CFMEUW became aware of these proceedings, and its decision to seek leave to intervene. The WASU contended that membership records were necessary to be produced by Mr Buchan to support his evidence that the CFMEUW has members in the local government industry. However, counsel accepted the proposition put by the Full Bench that evidence of membership of an organisation is not necessary for an organisation to seek the registration of an industrial agreement under s 41 of the *Act*, as eligibility for membership is sufficient in that respect.

24 In response, the CFMEUW submitted that the summons should be set aside as it was highly unusual for there to be a contested hearing on the merits, with cross-examination of deponents to affidavits and the production of documents, in an interlocutory application to intervene. The CFMEUW contended that it is a party to the extant *City of Rockingham Enterprise Agreement* and has been involved in bargaining in relation to the new agreement. Additionally, it was submitted that it is also a party to, 'covered by' and a signatory to a number of local government enterprise agreements that are now new State instruments under the *Act*. These were set out at annexure B to Mr Buchan's affidavit.

25 The CFMEUW also submitted that the statutory declarations of Mr Johnson and Ms Ballantyne filed by the LGRCEU, in opposition to the CFMEUW application to intervene, referred to the involvement of the CFMEUW in bargaining for enterprise agreements in local government, including at the City of Rockingham. They referred to the CFMEUW being present in some negotiation meetings, despite suggesting that it has a diminishing presence.

26 After hearing from the WASU and the CFMEUW in relation to the summons to Mr Buchan and the application to have it set aside, the Full Bench granted the application to set aside the summons, with reasons to be published in due course. The Full Bench also took Mr Buchan's affidavit as read, along with the statutory declarations of Mr Johnson and Ms Ballantyne, on behalf of the LGRCEU.

27 In support of the application for leave to intervene the CFMEUW referred to the seven local government agreements annexed to Mr Buchan's affidavit and that it is 'covered' by six of them, as prescribed by s 183 of the *FW Act*. The submissions also referred to the evidence of membership in the various local government workforces outlined in Mr Buchan's evidence.

28 In reliance upon the terms of s 80BB and s 80BG(2) of the *Act*, read with reg 7 and schedule 4 of the *General Regulations*, it was submitted that those agreements are 'industrial agreements' as new State agreements and the CFMEUW is a named party to a number of them. It was contended that the City of Cockburn's submissions to the contrary should not be accepted by the Full Bench. In reliance upon ***Onus v Alcoa of Australia Ltd*** [1981] HCA 50; (1981) 149 CLR 27 at 36, the CFMEUW submitted that the 'sufficient interest test' for the purposes of leave to intervene is a broad and flexible one, depending upon the nature of the proceedings. The question of sufficiency is not a matter of discretion, but rather degree and the relevant person seeking leave to intervene ought to have more than 'a mere intellectual or emotional concern in the subject matter and outcome of the litigation': ***Unions NSW v New South Wales*** [2023] HCA 4 at [21] – [22] per Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ.

29 It was also submitted that the question of construction of the *Act* is an issue in these proceedings, and the answers to the questions of law posed will affect clauses in all agreements that are of that kind, regardless of their specific content. In this regard, it matters not that the union is not a party to the *Agreement*. It was not contended that this formed the basis of the relevant interest. The CFMEUW's submission was that there is a sufficient interest because of its named party status to a number of local government industrial agreements and its membership in the sector, and there was no need for an immediate or direct private right to be asserted: ***Australian Conservation Foundation v Commonwealth*** [1980] HCA 53; 146 CLR 493 per Gibbs J at 526.

30 Furthermore, the CFMEUW submitted that the question of constitutional coverage, agitated by the WASU and the LGRCEU, carries with it an assumption that they have been successful in other proceedings under s 72A of the *Act* in applications CICS 5 of 2023 and CICS 8 of 2023, presently before the Commission in Court Session. The submission was that it is erroneous to adopt that approach, given that the status quo regarding what is before the Full Bench, is that the CFMEUW is a party to relevant local government agreements, as new State agreements, participates in bargaining for agreements in the sector and has membership. Furthermore, it was submitted that the industry wide implications of the matters before the Full Bench, specified in the CFMEUW's application for leave to intervene, are not contested by the other parties to the proceedings. An additional submission was that no material prejudice was identified in opposition to the CFMEUW's application.

31 The WASU, the LGRCEU, the City of Cockburn and the WALGA, all opposed the intervention application. The WALGA adopted the submissions of the City of Cockburn in this regard.

WASU submissions

32 On behalf of the WASU, it was submitted that the CFMEUW, not being a party to the *City of Cockburn Enterprise Agreement 2022*, should be regarded as an 'intruder' into the rights of the City of Cockburn and the union parties to it and there is otherwise an insufficient interest to justify its intervention in the proceedings: ***Re Ludeke; Ex parte Customs Officers Association of Australia, Fourth Division*** (1985) 155 CLR 513. After referring to the relevant principles in relation to the grant of leave to intervene under s 27(1)(k) of the *Act*, as discussed by the Full Bench in ***Amalgamation of the Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Food Preservers' Union of Western Australia Union of Workers*** [2016] WAIRC 00966; (2017) 97 WAIG 148, the WASU submitted the question for determination is whether the CFMEUW will be denied natural justice if it is prevented from intervening. The WASU submitted that that question should be answered in the negative.

33 In relation to the relevant principles, the WASU contended that the CFMEUW's rights are not direct, and it has no direct interest in the outcome of the proceedings. This is because, as the submission went, the CFMEUW is not a party to the *Agreement* and, if it is registered,the *Agreement* will not confer any rights on or impose any obligations on the CFMEUW.

34 In the alternative, whilst the decision of the Full Bench in ***Re AWU*** recognises that in certain situations an indirect interest will be sufficient, the CFMEUW has no such sufficient interest in these proceedings. This is because it cannot speak on behalf of the local government industry; there is an absence of evidence to support its contentions; its presence in the industry is contentious in the proceedings in application CICS 5 of 2023 and CICS 8 of 2023; the CFMEUW has no interest beyond the interest of any other registered organisation or employer under the *Act*; would have no standing to seek a writ of prohibition; and, if granted leave to intervene, it would effectively constitute interference with the rights and interests of the City of Cockburn, the WASU and the LGRCEU.

LGRCEU submissions

35 Similarly, the LGRCEU contended that the CFMEUW bears the onus to persuade the Full Bench that it should be granted leave to intervene. The LGRCEU did not cavil with the CFMEUW's submissions as to the relevant principles to apply. In particular, it was accepted that, for the purposes of s 27(1)(k), whether a person's interest is 'sufficient' is a question of degree and not one of discretion.

36 In this regard, the submission was made by the LGRCEU that findings of fact are necessary in order to support the grant of leave to intervene and the degree of membership of the CFMEUW is a relevant consideration. Further, not only is membership a relevant consideration, but it should be membership large enough to satisfy the sufficient interest criterion. In this regard, reliance was placed upon statutory declarations made by Mr Johnson, the Secretary of the LGRCEU, and the Assistant Secretary, Ms Ballantyne to the effect that the CFMEUW membership in the local government industry is quite limited. An

assertion was also made by the LGRCEU in the statutory declarations regarding the CFMEUW's propensity to enrol persons as members, not eligible to belong to the union. And that the CFMEUW's constitutional right to do so is contested by both the LGRCEU and the WASU.

37 Also relevant, according to the LGRCEU, is the level of participation of the CFMEUW in the local government industry and, on the statutory declarations of Mr Johnson and Ms Ballantyne, that is a declining presence. Nor, according to the LGRCEU, does the CFMEUW have a sufficient indirect interest to warrant granting leave to intervene. Along with the WASU submission, it was contended that the CFMEUW's interests are no greater than any other person operating in the State jurisdiction, which is of itself, an insufficient indirect interest to warrant granting leave to intervene.

City of Cockburn submissions

38 The City of Cockburn made submissions to the effect that the intervention application by the CFMEUW should be rejected because, in summary, it is not a party to the *Agreement*; it was not involved in bargaining for the *Agreement*; and it does not represent the industrial interests of any of the employees at the City of Cockburn.

39 The City of Cockburn referred to the letter from the Full Bench dated 26 July 2023, which set out a list of enterprise agreements made under s 185 of the *FW Act,* which became new State instruments under s 80BB of the *Act*. Submissions were made as to the effect of s 183 of the *FW Act*, in relation to an organisation applying to be 'covered by' an enterprise agreement once the agreement is made. It was contended that being 'covered by' an agreement in this way, does not make the organisation a 'party' to the agreement. It was contended, therefore, that the CFMEUW could not be a party to an industrial agreement deemed to be made under s 41 of the *Act*. Nor, according to the City of Cockburn, is the CFMEUW named in the proposed *Agreement*.

40 In referring to the relevant principles discussed by the Full Bench in ***Re AWU***, the City of Cockburn referred to a decision of Emmanuel C in ***Western Australian Prison Officers Union of Workers (WAPOU) v Minister for Corrective Services*** [2022] WAIRC 00636; (2022) 102 WAIG 1188. This case concerned an application to interpret an industrial agreement between the WAPOU and the Minister, in which the Civil Service Association sought leave to intervene. The basis of the application being that the CSA is a party to a number of public sector industrial instruments and the *Public Service Award 1992*, which contain clauses with very similar wording to the disputed clause in the proceedings. Commissioner Emmanuel found that this was an insufficient basis for the CSA to be granted leave to intervene.

41 Adopting this approach, the City of Cockburn submitted that nor does the CFMEUW have a sufficient interest in these proceedings, as it is not a party to the *Agreement*, and does not represent the industrial interests of employees of the City of Cockburn. Furthermore, to the extent that the *Agreement* may have an Award Offset Clause and an IFA clause, the mere fact of similar wording in clauses in other agreements is too tenuous to support a sufficient interest for leave to intervene. This issue also may be impacted by the s 72A proceedings, on the City of Cockburn submissions.

42 Given that the rights and interests relevantly for present purposes, are those of the parties to the *Agreement*, it was contended that no such rights arise in relation to the CFMEUW. Accordingly, the application should be dismissed.

Disposition of summons and the application for leave to intervene

43 For the reasons that follow, the Full Bench considered it was unnecessary for there to be further evidence from Mr Buchan, or for him to produce documents, in order to decide the issue of leave to intervene. The additional documents sought were not necessary to support the CFMEUW's application for leave to intervene and there was sufficient material before the Full Bench to consider the application, as we shall explain below.

44 Additionally, at the conclusion of the hearing, the Full Bench informed the parties that it was satisfied that the CFMEUW should be granted leave to intervene, with reasons to be published in due course. These are our reasons.

45 The power to grant leave to intervene in a matter is set out in s 27(1)(k) of the *Act*, which is as follows:

> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> …
>
> (k) permit the intervention, on such terms as it thinks fit, of any person who, in the opinion of the Commission has a sufficient interest in the matter; …

46 The relevant principles as to intervention applications are well settled in this jurisdiction and are not in contest. The leading High Court authority is ***Re Ludeke***. This and other cases, were discussed by the Full Bench in ***Re Australian Workers' Union***. The Full Bench at [17] to [21] observed as follows:

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

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

> The critical question is whether the prosecutor will be denied natural justice if it is allowed to intervene in ACOA's application only to the limited extent allowed by Ludeke J. It may be said immediately that it is clear that notwithstanding the wide discretion in matters of procedure given to the Commission by s. 40(1) of the Act, the Commission is bound to observe the rules of natural justice: *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* ((1969) 122 C.L.R. 546, at p. 552); *Reg. v. Moore; Ex parte Victoria* ((1977) 140 C.L.R. 92, at pp. 101-102); *Reg. v. Isaac; Ex parte State Electricity Commission (Vict.)* ((1978) 140 C.L.R. 615, at p. 620). That means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be heard before the order is made. That requirement will not necessarily be satisfied if the Commission relies only on the fact that the person concerned has been heard on the same question by the same member of the Commission on a previous occasion. In general, the rules of natural justice are not satisfied unless the opportunity to be heard is afforded in the proceeding in question, although the fact that there had been an earlier hearing would be relevant in determining what constituted a full opportunity to be heard. However, natural justice does not require that everyone who may suffer some detriment as an indirect result of an order of the Commission is entitled to be heard before the order is made. Orders made by the Commission may affect many members of the community who are not parties to the proceedings in question but that does not mean that any member of the community who will be indirectly affected by an order of the Commission has a right to be heard in those proceedings. It has been held that a person who is not a party to a dispute, but who may nevertheless be affected, indirectly and consequentially, by an order made in settlement of the dispute is not entitled to be heard before the matter is determined: *Reg. v. Moore; Ex parte Victoria; Reg. v. Isaac; Ex parte State Electricity Commission (Vict.)*.

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

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

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

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

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

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

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

47 There was material before the Full Bench to establish that the CFMEUW had a sufficient interest for the grant of leave to intervene in these proceedings. From the information provided by the Full Bench to the parties, by letter of 26 July 2023, and

as referred to at annexure B to the affidavit of Mr Buchan, there are at least seven enterprise agreements applying to local government employers made under the *FW Act*, that specify the CFMMEU as a 'party', and/ or being 'covered by' under s 183 of the *FW Act*. In most of them, Mr Buchan is a signatory to the relevant enterprise agreement. The CFMEUW is not a mere spectator or bystander in relation to most of these industrial instruments.

48 Whilst the City of Cockburn made submissions about the status of an organisation covered by an agreement under s 183 of the *FW Act*, an employee organisation, in order to be covered by an enterprise agreement, needs to be a 'bargaining representative'. By ss 176(1)(b)(i) and (3), an organisation cannot be a bargaining representative of an employee who will be covered by an enterprise agreement, unless the organisation is entitled to represent the industrial interests of the employee in relation to work to be performed under the agreement and the employee is a member of the organisation. This means the employee must fall within the eligibility for membership rule of the organisation: ***Regional Express Holdings Ltd v Australian Federation of Air Pilots*** [2016] FCAFC 147 per Jessup J (North and White JJ agreeing) at [56] to [60].

49 We tend to agree with the City of Cockburn that the mere giving of a notice to the Fair Work Commission under s 183 of the *FW Act* would not, of itself, be conclusive that an organisation participated in bargaining for an agreement. But, once an order is made by the Fair Work Commission approving an agreement under s 186 of the *FW Act* and notes that an organisation be covered by the agreement under s 201(2), supported by evidence, then this must be conclusive that the relevant organisation participated in bargaining for the agreement, and obtained standing accordingly. Otherwise, the relevant statutory scheme would be undermined.

50 By the terms of Part 2AA of the *Act*, in particular s 80BB set out above, and also s 80BG(2), on and from 1 January 2023, these enterprise agreements made under the *FW Act* became new State instruments under the *Act*. From that time, they were taken to be industrial agreements 'registered under the *Act*'. The only agreement capable of registration under the *Act* is an industrial agreement registered under s 41. Such agreements are taken to have been made between the relevant State organisation and the employer to whom the industrial agreement extends to and binds: ss 41(1) and (4) *Act*. Thus, there being no dispute that the CFMMEU is the counterpart federal body of the CFMEUW, by s 80BG(2), the industrial agreements referred to above, now new State instruments, have the CFMEUW as a named party or signatory to them.

51 In our view, the statutory scheme is clear. It is the plain intention of the Parliament, in enacting these provisions, from their terms, that there be continuity of coverage of former enterprise agreements made under the *FW Act,* by the same employees and employers and organisations under the *Act*, as a new State instrument, as part of the transitional scheme. In other words, the status quo is intended to apply for the transition period until a new industrial agreement is made, for example. This principle of continuity is also reflected in ss 80BT, 80BJ and 80BK of the *Act*, in relation to the continuity of service and leave entitlements for employees covered by a new State instrument.

52 Whilst the proceedings before the Full Bench on the question of law involve the agreement at the City of Cockburn, where the CFMEUW is not directly involved, it is beyond doubt in our view, that the issues arising in these proceedings have implications for the local government sector as a whole. Indeed, Minter Ellison, the solicitors for the City of Cockburn, with the support of the WALGA, wrote to the Chief Commissioner on 27 June 2023 and referred to the registration of the agreement proceedings before Walkington C. It was contended that the issues now the subject of the questions of law be referred to the Full Bench, due to the ramifications for the local government industry. Annexure A to Mr Buchan's affidavit is a copy of a notice on the WALGA website in these terms 'Issues arising from the Commission industrial agreement approval process', which appears to support this broader industry focus.

53 All of the enterprise agreements set out at annexure B to Mr Buchan's affidavit contain an IFA clause. Most of them also contain an exclusion provision in one form or other, in relation to the application of other industrial instruments.

54 Declarations and orders made in these proceedings, which may lead to one or another or both of the clauses of the *Agreement* being impugned, may directly affect the CFMEUW, as a party to or being a person bound by the relevant industrial agreements. The impugning of one or another or both clauses will alter the bargain struck between the parties, as set out in the agreements. As an industrial agreement deemed to be made under the *Act*, party status, as a person bound by an industrial agreement, is conferred on the CFMEUW, or any other organisation party to or bound by an industrial agreement. Under the *Act*, being bound by an industrial agreement provides standing for an organisation in relation to:

(a) an application under s 42 of the *Act*, in relation to bargaining for a replacement industrial agreement;

(b) an application to the Commission under s 44 of the *Act*, in relation to an industrial dispute concerning parties to a relevant industrial agreement and the employees covered by it;

(c) an application to the Commission to interpret the industrial agreement under s 46 of the *Act*; and

(d) proceedings for the enforcement of an industrial agreement under s 83 of the *Act*.

55 The alteration of an industrial agreement by a declaration that one or another or both of the clauses in contention in these proceedings, are void or voidable, either in whole or in part, may alter the enforceable content of the relevant industrial agreement and the certainty of the application of any underpinning award, in terms of applicable terms and conditions of employment that may apply to relevant employees. The parties to and persons bound by such an industrial instrument are directly affected by the terms of it and the nature of the matters that may be progressed, in invoking the Commission's jurisdiction, set out above.

56 As to the argument advanced by the City of Cockburn that intervention should be rejected based upon the approach taken by Emmanuel C in ***WAPOU***, we are not persuaded that this case assists the City's argument. That case dealt with the interpretation of an industrial agreement. Commissioner Emmanuel at [40] to [42] recognised that, when determining the objective intention of parties as to the text of a clause in an agreement, context is important, which may be peculiar to the particular agreement and the parties to it. This does not lend itself to applying the same approach to another agreement, even with similarly worded provisions, but which arose in a context particular to that other instrument and the parties to it.

57 In our view, for the foregoing reasons, there is a direct interest arising for the CFMEUW, as a proposed intervenor, as a consequence of the possible outcome of these proceedings. In and of itself, this is a sufficient interest, without the need to consider the ancillary issue of union membership, which appeared to occupy some degree of debate between the parties and the proposed intervenor.

58 Despite this, however, on the evidence as a whole, including that of the LGRCEU, there appears to be some involvement of the CFMEUW in bargaining meetings for a new agreement at the City of Rockingham. There would also appear to be, although it was cavilled with, some evidence of membership in various classifications, that may be seen, prima facie, to fall within the CFMEUW constitution rule. However, we say nothing more about these issues, as they are the subject of disputed proceedings before the Commission in Court Session in applications CICS 5 of 2023 and CICS 8 of 2023.

59 If we are incorrect and the CFMEUW only has an indirect interest, by reason of the matters set out above, in all of the circumstances of this case, applying the principles discussed in ***Re Ludeke***, we are satisfied that such an indirect interest is sufficient to grant the CFMEUW's application for leave to intervene in these proceedings.

60 We turn now to consider the questions of law.

Would the registration of the Agreement including clause 5 – Operation of the Agreement, in particular clause 5.2, be contrary to the *Act*?

City of Cockburn

61 The City of Cockburn submitted that the effect of s 41(9) when read with cl 5 of the *Agreement* is intended to establish the *Agreement* as a comprehensive document setting out all of an employee's terms and conditions of employment, without the need to have recourse to any other industrial instrument, other than statutory entitlements. It was submitted that, in particular, cl 5.2 is crucial to the bargain struck between the parties under the *Agreement*, and when read with s 41(9) 'gives effect to a practical and efficacious industrial instrument' (written submissions at [18]).

62 In the event that cl 5.2 in particular was held to be invalid, the City of Cockburn contended this would, in all likelihood, require a renegotiation of the *Agreement* relative to the terms of the various applicable awards. Accordingly, it contended that the answer to this question should be 'no'.

WALGA

63 The WALGA adopted the City of Cockburn submissions regarding this question. The WALGA also submitted that, as a part of the transitional issues associated with the transition of local government employers from the national industrial relations system to the State industrial relations system, one issue identified was the effect of s 41(9) of the *Act* in relation to new State instruments. This led to the making of reg 8(2) of the *General Regulations,* set out above, which provides that, during the term of a new State instrument, a State award will not apply unless provision is made to the contrary.

WASU

64 On behalf of the WASU, it was submitted that the registration of the *Agreement* inclusive of cl 5 would not be contrary to the *Act*. The thrust of the WASU submission was that cl 5.2, on its ordinary meaning, provides that all relevant awards that would otherwise apply to the City of Cockburn are deemed inconsistent with the *Agreement,* which brings into play s 41(9), such that the awards do not apply to the employer and the employees covered by the *Agreement*.

LGRCEU

65 The LGRCEU adopted a different approach to this first issue. It was submitted that in particular cl 5.2 of the *Agreement* does not adopt s 41(9). The union submitted that the purpose and effect of cl 5.2 is to exclude the operation of relevant awards in their entirety with the result that all terms and conditions of employment of employees covered by the *Agreement* are set out in the *Agreement* itself. By way of contrast, when considering the terms of s 41(9), the submission was made that its purpose and effect is to resolve inconsistencies between two industrial instruments, an award and an industrial agreement. For s 41(9) to be enlivened, both an award and an industrial agreement must have potential application, with the terms of s 41(9) resolving any conflict.

66 In this case, the LGRCEU contended that the intended effect of cl 5.2 of the *Agreement* is to exclude the possibility of any inconsistency or contrary terms because the purported effect of the clause is to oust the operation of an award entirely. This was submitted to be invalid on the basis that the effect of the clause is to purport to exclude the award framework, which the LGRCEU contended was not permissible under the terms of the *Act.*

CFMEUW

67 On behalf of the CFMEUW, it was contended that the terms of cl 5 is contrary to the *Act* and is invalid. It was submitted that cl 5 extends beyond the intended operation and effect of s 41(9), which deals with inconsistency or contrary provisions between an award and an industrial agreement. In particular, cl 5(2) does not merely intend to give primacy to the *Agreement*, in relation to any inconsistency or contrary terms, but rather, to exclude the operation of any relevant award regardless of whether there is textual inconsistency or not. In this sense, the CFMEUW submitted that the terms of cl 5 and in particular cl 5(2), is an attempt at a bare exclusion of any State award, thereby circumventing the effect of s 41(9) of the *Act*.

68 As a part of its submissions, the CFMEUW referred to the history of the *City of Cockburn Enterprise Agreement 2019-2022*, which was approved under the *FW Act*. In particular, reference was made to s 57(1) of the *FW Act*, which provides that a 'modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment'. It was submitted that this provision clearly underlays the same term in the former federal agreement, carried over as a new State instrument under the *Act*. This is given effect by the terms of reg 8 of the *General Regulations.* It was submitted that this approach is inconsistent with the scheme of collective bargaining in the State system, which is underpinned by the terms of a relevant award.

69 In this respect, the CFMEUW referred to a decision of the Full Bench in ***ALHMWU v Ngala Family Resource Centre*** (1996) 76 WAIG 1658. In particular, the observations of Sharkey P and Coleman CC at 1662, that enterprise bargaining under the then Statement of Principles does not 'separate from the existence of an award'. In referring to ss 37 and 40B of the *Act*, dealing with the common rule application of an award and the ability of the Commission of its own motion to deal with important matters such as minimum conditions of employment and discriminatory provisions, the CFMEUW submitted that these powers would be rendered nugatory if the terms of cl 5 were held to be valid and the *Agreement* registered.

70 The CFMEUW responded to the Minister's submission that if the *Agreement* simply sought to exclude the operation of relevant awards without itself prescribing terms and conditions of employment, this would arguably be inconsistent with the *Act*. It contended that to the extent that cl 5(2) provides for the exclusion of award entitlements where no such entitlement is specified in the *Agreement* and also where the *Agreement* is silent on a matter provided for in an award, then this precisely seeks what the Minister says is arguably contrary to the *Act*.

71 As to the question of inconsistency, again referring to the Minister's submissions in relation to the 'covering the field' test of inconsistency, the CFMEUW submitted that the decisions in ***John Holland Pty Ltd v Victorian Workcover Authority*** [2009] HCA 45; 239 CLR 518 and ***Work Health Authority v Outback Ballooning Pty Ltd*** [2019] HCA 2; (2019) 266 CLR 428 do not assist the Minister. It was submitted that those two decisions are authority for the proposition that a statement of intent that a Commonwealth Act 'covers the field', as a question of statutory interpretation, is only relevant to the issue of the existence of such an intention. The substantive provisions of the statute in question must be capable of supporting such a conclusion.

72 On this basis, the CFMEUW contended that cl 5 travels well beyond such a circumstance, because it expressly acknowledges there may be no *Agreement* provision upon which any inconsistency could be based. Overall, it was submitted that cl 5 should be regarded as invalid, as it is no more than an attempt to undermine the award-based system underpinning collective bargaining, within the framework of the *Act*.

Minister

73 For the Minister, his submission was that cl 5 is valid and would not be contrary to the *Act* in the sense of being inconsistent with the legislation: ***Minister for Labour v Como Investments Pty Ltd & Ors*** (1990) 70 WAIG 3539 at 3543. The overarching submission of the Minister was that the terms of cl 5 of the *Agreement*, represent an attempt to 'cover the field' and to provide a scheme of comprehensive regulation of terms and conditions of employment for the employer and employees to be bound by the *Agreement*. This was said to be a permissible course under the *Act*.

74 In the terms of the language of s 41(9), the Minister contended that given the provisions of cl 5.1 it excludes the application of any relevant award completely. Secondly, cl 5.2 has the effect of deeming award provisions that are different to or not otherwise referred to in the *Agreement* as being inconsistent with it. On this basis, for the purposes of s 41(9), the Minister submitted that these provisions are properly characterised as being 'contrary to or inconsistent' with the relevant awards.

75 In support of his submissions, the Minister referred to the tests of constitutional inconsistency under s 109 of the *Commonwealth Constitution*, between a State law and a Commonwealth law, either on the basis of direct inconsistency or indirect inconsistency/covering the field approach. In this respect, the Minister referred to ***Outback Ballooning***. The Minister also referred to the wide scope of the indirect inconsistency approach, as determined by the High Court in ***New South Wales v Commonwealth*** [2006] HCA 52; (2006) 229 CLR 1 at [370]. It was submitted that this case is authority for the proposition that indirect inconsistency may also arise where a Commonwealth law creates a scheme of less detailed regulation than the provision of a State law, as well as where a more detailed form of regulation exists.

76 Adopting this broad-brush approach, the Minister therefore contended that if the *Agreement* only sought to exclude the operation of relevant awards without itself setting out terms and conditions of employment, then this would arguably amount to an attempt to manufacture inconsistency and arguably be contrary to the *Act*. On this basis, s 41(9) would have no work to do, as there would be no inconsistency. The Minister contended, however, that there is no such suggestion by any party to these proceedings.

77 It was the Minister's submission that cl 5 of the *Agreement* constitutes a clear and unambiguous expression of intent to completely cover the terms and conditions of the employees' employment to the exclusion of any relevant award. On this basis, the effect of s 41(9) would mean that the *Agreement* would prevail over any relevant award that otherwise may apply.

Disposition of cl 5 issue

78 In our view, for the following reasons, the registration of the *Agreement* including cl 5 as proposed, would not be contrary to the *Act*.

79 Section 41(9) of the *Act*, set out above, deals with the relationship between an award and an industrial agreement. Both an award made under Part II Division 2 of the *Act*, and an industrial agreement registered under s 41 of the *Act*, in Part II Division 3 of the *Act*, are industrial instruments that prescribe terms and conditions of employment for employees subject to and bound by the award and industrial agreement respectively. There is nothing to suggest from the terms of the *Act*, when read as a whole, that an award must be in existence before an industrial agreement can be registered. There is nothing, in the *Act*, as a whole, to suggest that an industrial agreement is an inferior instrument: ***Hungry Jacks Pty Limited and Ors v Wilkins*** (1991) 76 WAIG 1751 per Anderson J at 1756. The *Act* contemplates that both forms of industrial regulation may be made and given effect under the *Act*. Both an award and an industrial agreement, once the agreement is registered under s 41, have statutory effect.

80 There is nothing in the objects of the *Act* in s 6, that suggests to the contrary. Rather, the objects of the *Act* in ss 6(ad), (ae) and (ag) encourage the making and registration of industrial agreements. The only question of primacy dealt with in the objects of the *Act*, is that provided in s 6(ad), to the effect that the *Act* promotes collective bargaining and the primacy of collective agreements (which must be industrial agreements) over individual agreements.

81 In the ***Hungry Jacks*** case, prior to s 41(9) being inserted into the *Act*, the Industrial Appeal Court dealt with the question of a conflict between the terms of an award and terms of an industrial agreement that applied to the employer and its employees. The award was an award applying by common rule and the agreement applied only to the relevant enterprise and its employees. At the time of the proceedings giving rise to the appeal, s 41(3) was in a different form, which enabled, but did not compel, the Commission, prior to registering an industrial agreement, to require the parties to vary it to firstly, give clear expression as to the true intention of the parties and secondly, to remove any inconsistency with an award binding on the same employer and employees.

82 In approaching the issue of inconsistency, Nicholson J, after examining the relevant provisions of the *Act* then in effect, and the history of both the award and the industrial agreement, ultimately concluded at 1755:

> Examining the contents of the Award and the Agreement and the legislative history of each it seems to me to be apparent that Parliament has sought to preserve the special against the general by continuing the effect of the Agreement in the face of the Award. In my view, the Agreement is to be considered the more particular of the two because it is made between a limited number of parties for its particular operations and not as a matter of common rule. This is so although parties have been added to it either as a consequence of actual or deemed concurrence and even though parties may apply to be named in the Award. The particular provisions are therefore not to be regarded as overborne by the general provisions of the award. This is consistent with the Commission itself having permitted the filing of the Agreement in face of knowledge of the making of the Award.

83 In his reasons, Anderson J (Rowland J agreeing), after having concluded from an examination of their terms that relevant parts of the award and the agreement were inconsistent, went on to say at 1756:

> I can find nothing in the Act that would support the general proposition that awards have superior status in terms of binding effect. Both instruments obtain their binding effect from the operation of the Act. Whilst an award is an order of the Commission and an agreement is the result of consensus there is nothing in that difference of genesis to elevate awards to a position of supremacy. To the contrary, there are a number of provisions which suggest that, if any primacy is to be given, it is to be given to industrial agreements. Reference may be made to s 32 which obliges the Commission to first embark on a rigorous[sic] process of conciliation before proceeding to arbitration. The primary objective of the Act seems to be to get industrial disputes resolved by agreement. There are, as Commissioner Fielding has pointed out below, extensive provisions dealing with the registrationof agreements and providing for their binding effect and enforceability.
>
> The Act plainly contemplates that awards and agreements may co-exist. For example, by s 41(3), the Commission is expressly empowered before registering an agreement to require parties to remove any inconsistency with an overlapping award. Although on a first reading it may seem to do so, I do not regard this provision as recognising the supremacy of awards over agreements. In the first place, the subsection is permissive in its terms, not mandatory. It confers a discretion on the Commission to require an industrial agreement to be brought into line with an overlapping award. Secondly, the provision is not accompanied by a provision to the effect that agreements already having binding effect, agreements antecedent to awards, are to be varied to remove any inconsistency with subsequent awards. And of course there is no provision, as there could easily have been, expressly conferring supremacy on awards or invalidating an agreement to the extent of any inconsistency with an award.
>
> This is a case of a tribunal invested with the power to bring into existence binding and coercive instruments of equal status, which instruments may turn out to be inconsistent in their terms. It seems to me there are two ways to resolve any such inconsistency. There may be more than two ways but only two occur to me. One of these is not the way contended for by the complainant, that is, to decline to recognise the presence of an inconsistency if it is possible for the parties to behave in a way that complies with the minimum requirements of both instruments. For the reasons I have endeavoured to express, I do not consider this is a correct approach. If there is an inconsistency it must be resolved. There is an inconsistency if the agreement fixes one minimum rate of wages and the award fixes another in respect of the same employees. To purport to resolve that by requiring the higher minimum rate to be paid does not, in truth, resolve the inconsistency but disregards it. There is another reason why this approach is unsatisfactory. Take the case of competing instruments each having the same subject matter but providing for different terms and conditions of employment. From the point of view of both sides, each instrument may have its good parts and its bad parts. To resolve the inconsistencies by requiring that one party be given the best of both instruments would be to create a set of industrial conditions that is neither the product of conciliation nor award.

84 In determining the issue, Anderson J touched on the possibility of applying the doctrine of repeal by implication, but said at 1757:

> One way to resolve the problem might be to apply the doctrine of repeal by implication. The application of this rule of statutory interpretation in the field of industrial awards and agreements would require it to be held that, for example, a subsequent agreement should be taken as "repealing" an existing award. Alternatively it would require it to be held that a subsequent award should be taken as "repealing" an existing agreement. I think in either case it would be a very artificial resolution of the problem once it is remembered that the original respondents to competing awards would often be different, and the employer parties to an agreement would often, indeed almost invariably, be different from the respondents to a competing award. And anyway, the maxim rests on Parliament's unfettered authority to legislate, whether by repeal or otherwise. The Commission does not have an unfettered authority to cancel or vary awards or agreements. In my opinion therefore, the fundamental basis for an implication that a later award or agreement is intended to effect a cancellation or variation of an earlier inconsistent instrument is missing.

85 Accordingly, Anderson J concluded at 1757 that the resolution of the issue raised by the appeal was as follows:

> This leaves what I think is really the only other option. That is to examine each instrument to see whether one can fairly be said to have peculiar application to the particular parties and to their particular situation. If it should appear that the

Commission has sanctioned an agreement having particular application to particular industrial circumstances, it seems to accord with fairness and common sense and to be more conducive to the resolution of industrial conflict to hold that the agreement should not be impliedly or accidentally overridden by some other instrument whether earlier or later in time that does not have particular application to the particular industrial circumstances of the parties. The general should yield to the particular. This is especially so when, as in this case, the award obtains its applicability (if any) to the parties only by operation of the common rule provisions.

In my opinion, as the Act presently stands, that is the proper way to resolve the question whether parties to a registered industrial agreement are bound by conflicting provisions of an award.

86 The conclusion that an award and an industrial agreement under the *Act* are of equal status is an important one. It is of assistance and informs the approach to the construction of s 41(9) of the *Act*, and the relationship between awards and industrial agreements generally. The ***Hungry Jacks*** case applied the principle that the specific will override the general, in relation to conflicts between the terms of an award and an industrial agreement, having application to the same employer and employees. As a general proposition, unless the relevant award is enterprise specific, in most cases an award will apply by common rule.

87 In ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union Western Australian Branch*** [2002] WASCA 355; (2002) 83 WAIG 208, the Industrial Appeal Court dealt with an appeal from a decision of the Commission in Court Session regarding the continuing effect of an industrial agreement that had passed its term date, but remained in force under s 41(6) of the *Act*. The issue arising on the appeal was whether the Commission in Court Session had jurisdiction to make an enterprise specific award having application to the same employer and employees, despite the ongoing continuing effect of the industrial agreement. Whilst the Court dismissed the appeal, Hasluck J (EM Heenan J agreeing) referred to the ***Hungry Jacks*** case and noted that s 41(9) of the *Act* reflected the approach taken to the relationship between industrial agreements and an award, as set out in ***Hungry Jacks***.

88 The approach to statutory construction is well settled. In ***Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board*** [2021] WASCA 208; (2021) 101 WAIG 1457, Kenneth Martin J observed at [58] to [63] as follows:

> 58 There was no major disagreement between the parties (save in a respect discussed later in these reasons) over the principles of statutory construction applicable to the present task. Those principles are found extensively discussed by both Scott CC[36] and later in the Full Bench reasons of Kenner SC.[37]
>
> 59 Given those principles are well settled, I mention only three leading case authorities relevant towards the present exercise. First, I mention the observations of Buss J as the presiding member of the Industrial Appeal Court in ***The Commissioner of Police v Ferguson***.[38] In that appeal, Buss J addressed the principles of statutory construction relevant to the interpretation of s 33W of the *Police Act 1892* (WA). Conducting the exercise by reference to High Court authorities, his Honour observed:[39]
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> > 70 In ***Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd***, French CJ, Hayne, Crennan, Bell and Gageler JJ observed:
> >
> > > 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text' (***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41). So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself' [39].
> >
> > See also ***Saeed v Minister for Immigration and Citizenship***; ***Thiess v Collector of Customs***.
> >
> > 71 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 statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the existing state of the law, the history of the legislative scheme and the general purpose and policy of the provision (in particular, the mischief it is seeking to remedy). See ***CIC Insurance Ltd v Bankstown Football Club Ltd***; ***Project Blue Sky Inc v Australian Broadcasting Authority***; ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue***.
> >
> > 72 The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See ***Certain Lloyd's Underwriters v Cross***. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose. See ***Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd***.
> >
> > 73 As Crennan J noted in ***Northern Territory v Collins***, '[s]econdary material seeking to explain the words of a statute cannot displace the clear meaning of the text of a provision (***Nominal Defendant v GLG Australia Pty Ltd*** (2006) 228 CLR 529 at 538 [22] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2006] HCA 11), not least because such material may confuse what was "intended … with the effect of the language which in fact has been employed" (***Hilder v Dexter*** [1902] AC 474 at 477 per Earl of Halsbury LC)' [99]. That statement of principle applies to

> extrinsic evidence admissible at common law and also to extrinsic evidence admissible under s 19 of the *Interpretation Act 1984* (WA). In other words, the statutory text, and not non-statutory language seeking to explain the statutory text, is paramount. See ***Nominal Defendant v GLG Australia Pty Ltd***. (footnotes omitted)

60 Second, a significant decision concerning statutory interpretation was provided by the joint reasons of Kiefel CJ, Nettle and Gordon JJ in ***SZTAL v Minister for Immigration and Border Protection***; ***SZTGM v Minister for Immigration and Border Protection***.[40] Their Honours had observed there that:[41]

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of the word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

61 Gageler J, in providing separate reasons towards situations where a court is confronted with a 'constructional choice' towards the possible meanings of a statute, observed:[42]

> 37 ... The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.
>
> 38 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.
>
> 39 Integral to making such a choice is a discernment of statutory purpose ... (footnotes omitted)

62 Gageler J's observations in ***SZTAL*** are presently relied upon by PIM to bear upon two aspects of its arguments supporting a narrower construction of the term 'construction industry' as deployed in the Act. First, PIM submits that its contended meaning of 'construction industry' (which would limit the application of the definition only to nominated activities carried out at either building sites or construction sites) is open as one possible constructional choice. It is a meaning that PIM, invoking the observations of Gageler J, says is not wholly ungrammatical or unnatural.[43] Next, building from the assumed platform of that construction being open, PIM says that its contended meaning of the defined term 'construction industry' is a better fit overall - measured against the statutory purpose of the Act.[44] This point will be elaborated upon later in these reasons.

63 The last case authority I mention regarding statutory construction is ***Commonwealth v Baume***.[45] It provides longstanding authority for the proposition that the task of statutory interpretation should proceed on a basis of assuming that words in legislation be afforded some measure of coherent utility. Put in more colloquial terms, text deployed within legislation ought to be assessed on the basis that it has some 'work to do'. The more recent observations in ***Project Blue Sky Inc v Australian Broadcasting Authority***[46] reaffirm this principle.

89 Thus, it is first necessary to consider the meaning of s 41(9) from its text, consistent with the above principles. Second, it is necessary to consider cl 5 of the *Agreement*, in light of the construction of s 41(9), and whether the terms of s 41(9) are enlivened.

90 In its ordinary meaning 'contrary' means '**1** …. mutually opposed **2**. The opposite, the other (of two things) … **5.** Opposite in position or direction;' 'inconsistent' means relevantly '**2.** Not consisting; not agreeing in substance, spirit or form; not in keeping; at variance, discordant, incompatible, incongruous **3.** Wanting in harmony; self-contradictory; involving inconsistency …' (*Shorter Oxford English Dictionary* at 415 and 1049).

91 Where an industrial agreement is contrary to or inconsistent with an award, the industrial agreement 'prevails' unless the agreement expressly provides otherwise. To 'prevail' means to '**1.** To become very strong; to increase in vigour or force…
2. To be superior in strength or influence, to have or gain the superiority or advantage; to gain the mastery or ascendency; to be victorious' (*Shorter Oxford English Dictionary* at 1665). Thus, whilst in and of themselves, an award or industrial agreement are to be accorded equal status under the *Act*, in the case where s 41(9) is enlivened, then the clear intention of the Parliament, from the plain meaning of the words used, is that the industrial agreement becomes the superior instrument.

92 Relevant to the construction of s 41(9), as the above authorities refer, is legislative history and any relevant extrinsic materials.

93 Section 41, as originally inserted into the *Industrial Arbitration Act 1979-1982* (WA), made provision for consent awards to be made by the Commission, where parties had reached an agreement with respect to any industrial matter. Section 41(2) required the Commission to make such an award, subject to ensuring the award to be made was not inconsistent with the *Act*; was not inconsistent with any decision of the Commission in Court Session intended for general application; and was not otherwise contrary to the public interest.

94 The predecessor to the current s 41, making provision for industrial agreements, was first introduced into the *Act* by the *Acts Amendment and Repeal (Industrial Relations) Act (No.2) 1984* s 26. Notably, s 41(2) provided that the Commission was obliged to register an agreement as an industrial agreement if and to the extent that the terms of the agreement were not

contrary to the *Act* or any General Order made under s 51 or any principles formulated in the course of proceedings in making a General Order under s 51. Additionally, before registering an industrial agreement, the Commission was empowered under s 41(3), to require the parties to give effect to a variation of the agreement to give expression to their true intention and to remove any inconsistency with an award in force.

95 There were, thus, up to this time, obligations imposed on the Commission to reject the registration of an industrial agreement if any term was inconsistent with the requirements of the then s 41(2). The Commission was empowered to require variations to an agreement for the purposes specified in s 41(3).

96 Subsequently, in 1993, the *Industrial Relations Amendment Act 1993* s 13 repealed and re-enacted s 41 to largely reflect its current terms. The involvement of the Commission in the registration process was very much reduced. In the Second Reading Speech on the introduction of the *Bill*, the then responsible Minister, in outlining the intention of the amendments to the *Act*, observed as to the industrial agreement provisions:

> Industrial Agreements: Until now, parties in Western Australia wishing to develop an enterprise bargain have had considerable statutory difficulty in doing so. The Industrial Relations Act contains no provisions to facilitate comfortably such an arrangement. In the 1992 State wage case decision the commission acknowledged the difficulty and determined that, until the legislation was amended to provide an appropriate mechanism, parties could only register an agreement struck between them by a contrived adoption of section 41 which normally facilitated industrial agreements. This Bill will allow parties to come to an agreement without the intervention of the commission. The Industrial Relations Act currently provides, under section 41, that industrial agreements cannot be made a common rule. However, the present difficulty for facilitating enterprise bargaining by this means is the requirement that agreements registered under this section must not be contrary to any general order or principles formulated in the course of proceedings in which a general order is made. Hence the current wage fixing principles are applicable to such agreements.
>
> A further constraint lies in the fact that any agreement registered under section 41 must not be inconsistent with an award in force. Thus, the very principle which lies at the heart of enterprise bargaining - this is, that parties may directly and freely negotiate with one another over a broad range of matters - is fundamentally denied by these constraints. The provisions contained in this Bill seek to amend those sections of the Act to remove those constraints. Thus, an employer, or an organisation or association of employers and an organisation or association of employees, may make an agreement with respect to any industrial matter without a requirement for the commission to ensure that the agreement is consistent with general wage principles. Section 42 will be repealed to remove the capacity for other parties to be added to the industrial agreement.
>
> The effect of these and other modifications is that section 41 industrial agreements will provide the established conciliation and arbitration industrial relations system with a workable mechanism for registering what are effectively enterprise agreements. The Government has said repeatedly that it has no intention of abolishing the award system, and that it believes in choice. That is demonstrated very clearly in these amendments to the industrial agreements section of the Act.
>
> (Hansard 8 July 1993 p 1461)

97 However, s 41A was inserted in the 1993 amendments in s 14 of the *Amending Act*, which still contained restrictions on the Commission registering industrial agreements. Materially, s 41A(1)(b) prohibited the registration of an industrial agreement if any term of the agreement was contrary to the Act; or any general order made under s 51, or any principles formulated in s 51 general order proceedings.

98 In 2002, by ss 131 and 132 of the *Labour Relations Reform Act 2002* (WA), Parliament inserted s 41(9) into the *Act* and a new s 41A. Parliamentary materials regarding the introduction of the *LRRA 2002,* reveal no express consideration of the terms of s 41(9). The former ss 41(2) and (3), referred to above, were not reinserted into the *Act* in the 2002 amendments, and the 1993 reforms were maintained. However, s 41A was substantially amended to remove the restrictions on the Commission's power to register an industrial agreement, as referred to at [94] above. Under s 41A of the *Act* as it now is, they are very minimal. Notably, because of the 2002 changes, the fact that a term of an industrial agreement was inconsistent with the *Act*, was removed as a barrier to registration.

99 All of this reflects a Parliamentary intention that industrial agreement making at the enterprise level, was intended by the Parliament to be a matter left entirely to the parties, with very minimal intervention by the Commission, both as to the content of industrial agreements, and as to the registration procedure under the *Act*. This is also entirely consistent with the conclusions reached earlier in these reasons, that an award and an industrial agreement are, prima facie, industrial instruments of equal standing.

100 More appositely for present purposes, if the parties to an enterprise have reached a consensus and seek to reflect that consensus in an agreement to be registered and to have statutory effect under the *Act* as an industrial agreement, that instrument should be given primacy in the event of any conflict with an existing award. Given the legislative history of ss 41 and 41A, in our view, that is the plain intendment of the Parliament in enacting these provisions and reflects how they should be interpreted. The imputed intention of the legislature is important in the role of a court in making a constructional choice as to the meaning of legislation: ***Outback Ballooning*** per Gageler J (as his Honour then was) at [77]. It would be a large step to read back into the legislation the effect of provisions Parliament has removed, and it would be a course at odds with the principles of statutory interpretation to which we have referred.

101 Returning then to the terms of cl 5 of the *Agreement*. Clause 5(1), in our view, is a statement of intent that the *Agreement* is intended to contain an exclusive code as to terms and conditions of employment for the employer and employees governed by it, to the exclusion of the two relevant awards specified in cl 5.1 and any other award made under the *Act.* Clause 5.2, then, with some particularity, sets out the intention of the parties as to the content of the *Agreement*. The words 'intended to set out all of the Employees' terms and conditions of employment' is consistent with cl 5.1, that the *Agreement* is intended, subject to

statutory terms, to exclusively set out the terms and conditions for employees covered by it. The next sentence commencing 'To the extent that …' expands on cl 5.1 and the first sentence of cl 5.2. What it does is spell out, in the language of the parties to the *Agreement*, the clear intention that the terms of any award, as defined in cl 5.1, are deemed to be inconsistent with the terms of the *Agreement*, whether specified in the *Agreement* or not and that the latter shall prevail. In our view, this is a valid invocation of the operation of s 41(9).

102 Taken together, what these two clauses do is to exclude, by express agreement, inconsistent terms in an Award as defined, and to deem any Award provisions, not otherwise specified in the *Agreement*, as also inconsistent with the *Agreement,* and overridden. Whilst at first blush it might be said that there can be no inconsistency between an award and an industrial agreement if the award provides for a term and condition and the agreement does not so provide, cl 5 read as a whole, is intended to constitute the relevant inconsistency or contrary term(s) to enliven s 41(9).

103 Such an approach to the construction of cl 5 of the *Agreement*, read with s 41(9), within the context of the legislative history of s 41 as a whole, is consistent with the capacity of negotiating parties to decide for themselves, the breadth of operation and effect of an agreement, when registered as an industrial agreement.

104 To the extent that it is necessary to do so, the constitutional principle of covering the field or indirect inconsistency, as set out and discussed by the High Court in ***New South Wales v Commonwealth***, is of some assistance. It is unnecessary, on the authorities, for there to be in every case of indirect inconsistency, a less detailed scheme specified in the Commonwealth law than provided for in the State law. As we have said, the *Agreement,* in cl 5, is not of the kind that attempts to manufacture inconsistency. What the *Agreement* does is to specify its intent to cover the field as to terms and conditions of employment for the employer and employees to be covered by it, and then goes on to specify, in substantial detail, the terms and conditions of employment that will apply. We are not, therefore, persuaded by the CFMEUW's submissions that cl 5.2 is a bare attempt to manufacture inconsistency. When read as a whole, in light of the clear paramountcy intended by the terms of s 41(9), registration of the *Agreement* including cl 5 would not be contrary to the *Act*.

Would the registration of the *Agreement* including clause 6 – Individual Flexibility Arrangements, be contrary to the *Act*?

105 The terms of the proposed cl 6 - Individual Flexibility Arrangements has been set out above.

City of Cockburn

106 The City of Cockburn contended that the IFA clause should be regarded as valid and not inconsistent with the *Act*. It was submitted that the IFA clause does not of itself confer a right on an individual employee and the employer to vary the *Agreement* or to negotiate a new industrial agreement. Rather, on the City of Cockburn's submissions, the effect of the clause is to enable an individual employee(s) and the employer to alter the effect of a term of *Agreement*. In this respect, reference was made to the predecessor industrial agreement containing such a clause, based upon the terms of s 202 of the *FW Act*. This provision, notably, requires an enterprise agreement to include a 'flexibility term' that enables an employee and his or her employer to agree to an arrangement known as a 'individual flexibility arrangement', which varies the effect of the enterprise agreement in relation to the employee and the employer. In the absence of a flexibility term, an enterprise agreement registered under the *FW Act*, is taken to include a 'model flexibility term' as prescribed by the *Fair Work Regulations 2009* (Cth).

107 It seems clear enough that the IFA clause has its origins in the former enterprise agreement made under the *FW Act*, containing a mandatory requirement for a 'flexibility term' as described. No such statutory provision exists under the *Act* in relation to the registration of agreements as industrial agreements in this jurisdiction.

108 It was submitted by the City of Cockburn that it is only varying the effect of the *Agreement*, which is permitted by the IFA clause. Contrary to the submissions of other parties to the proceedings, it was submitted that any agreement created under the IFA clause could not be an Employee-Employer Agreement under Part VID of the *Act*, as it could never meet the statutory requirements of Part VID and, therefore, is not inconsistent with the *Act*, as the submission went.

109 Furthermore, the City of Cockburn contended that s 114 of the *Act*, precluding contracting out of industrial instruments, did not have any effect, on the basis of two propositions. The first was that any individual arrangement under the IFA clause reached between an employee and the employer is not a contract to which s 114 applies. Secondly, it was submitted that, in any event, an individual arrangement under the IFA clause can only be made if the employee party to it is better off overall compared to the terms of the *Agreement*.

110 Accordingly, the City of Cockburn contended that the Full Bench should conclude that the registration of the *Agreement* containing cl 6 would not be contrary to the *Act*. In the alternative, the City of Cockburn submitted that should the Full Bench determine that the IFA clause would be invalid in its proposed terms, then consideration could be given to an amended IFA clause. It was proposed that the clause could be amended to require the employer to obtain the consent of the other parties to the *Agreement* to the proposed IFA and, if such consent were forthcoming, the proposed IFA could be implemented.

WASU

111 On behalf of the WASU, it was submitted that the IFA clause would be contrary to the *Act* if contained in the *Agreement* for registration. WASU's principal submission was that it is a prime object of the *Act* for there to be the promotion of collective bargaining and to establish the primacy of collective over individual arrangements, as set out in the objects of the *Act*, to which we have referred above. It was contended that, consistent with the objects of the *Act*, the only way in which an individual agreement could prevail over a collective agreement was if the individual agreement was one sanctioned by the terms of the *Act* itself. In this respect, the submission was that the only form of individual agreement, which is given effect under the *Act*, is an EEA made under Part VID. These agreements cannot be made under Part VID whilst an industrial agreement is in force.

112 Furthermore, the WASU contended that cl 6 purports to enable an employee(s) of the City of Cockburn to 'vary' the effect of the terms of the *Agreement* in relation to a range of important matters including the performance of work, overtime rates, penalty rates, allowances and leave loading. Given the terms of s 41 of the *Act*, it is only the parties to an industrial agreement

that can vary its terms. This means, it is only an agreement reached between the City of Cockburn, the WASU and the LGRCEU, as the parties to the *Agreement*, who can vary it. It is not permissible, and it would be misleading according to the WASU submission, to purport to confer a right upon an individual employee and the City of Cockburn to vary the effect of the *Agreement*.

113 Moreover, it is clear, according to WASU, that the basis for the IFA clause is s 202 of the *FW Act*. Given there is no such provision in the *Act*, and there is nothing else within the *Act* which would confer any legally enforceable instrument status on such an IFA, and nor could all the parties to the *Agreement* enforce such an IFA, then the Full Bench should conclude that such an arrangement is impermissible.

LGRCEU

114 On behalf of the LGRCEU, it was also submitted that the terms of cl 6 of the *Agreement* would be inconsistent with the *Act* upon registration. It contended that the IFA clause purports to enable an employee and the employer to vary the terms of the *Agreement* without the authority of the statute. Furthermore, such a variation can purportedly be effected without the involvement of all of the parties to the *Agreement.* Consistent with the WASU submission, the LGRCEU contended that the only basis on which the *Agreement* can be varied is by the making of a subsequent agreement made by and between all of the parties to it, under s 43(1) of the *Act*. It submitted that the reasoning of the Industrial Appeal Court in ***Ngala Family Resource Centre v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Division*** (1996) 77 WAIG 2551, which struck down a not dissimilar provision, as proposed to be included in an award of the Commission, has application to the present circumstances.

115 Adopting the reasoning of Anderson J in that case, the LGRCEU submitted the proposed IFA clause in the *Agreement*, would be inconsistent with the structure of the *Act* as a whole, and contrary to the relevant objects of the *Act*. In this respect, the LGRCEU submitted that s 6(ad), promotes collective bargaining and establishes the primacy of collective agreements over individual agreements. This is inconsistent with the proposed IFA clause. The only way of making individual agreements, as an EEA, is under Part VID.

116 Finally, it contended that s 114 of the *Act*, dealing with contracting out, was not of assistance in determining the question whether the IFA clause would be inconsistent with the *Act* on its registration.

CFMEUW

117 The CFMEUW submitted that the IFA clause would be invalid, of no effect, and the registration of the *Agreement* would be contrary to the *Act*. The broad submission made was that the clause would be invalid and of no effect by reason of being inconsistent with the legislative scheme under the *Act*, in particular having regard to ss 6(ad), 41, Part VID dealing with EEAs and 114 of the *Act*.

118 As with other submissions, the CFMEUW referred to s 202 of the *FW Act*, and the mandatory requirement that enterprise agreements contain a flexibility term. No such provisions are contained in the *Act*. The CFMEUW submission also referred to the fact that EEAs under Part VID in s 97UF of the *Act* cannot be made whilst an industrial agreement made under s 41 is in effect. It was submitted that effectively, the IFA clause purports to enable an individual employee(s) and the employer to vary the effect of the terms of the *Agreement* by circumventing the terms of s 97UF and to contract out of the *Agreement,* without the corresponding protections under the *FW Act* or the obligatory requirements relating to EEAs made under the *Act*.

119 Insofar as s 114 of the *Act* is concerned, the CFMEUW submitted that there is no barrier to a contract of employment providing for more generous terms than an industrial agreement. From the terms of the IFA clause, there is nothing within it that would protect against a derogation of the provisions of the *Agreement*, despite the inclusion of a 'better off overall' provision in cl 6(2). Furthermore, as with the WASU and the LGRCEU, the CFMEUW submitted that the IFA clause would purport to enable employees, not parties to the *Agreement* registered under the *Act*, to purport to vary it, in circumstances where the parties to the industrial agreement have not done so.

120 Accordingly, it was submitted that the registration of the *Agreement* with the IFA clause would 'fundamentally undermine and derogate from the legislative regime. Such a clause would alter the character of an agreement such that it would not be amenable for registration' (written submissions at [41]). In other respects, the CFMEUW adopted the Minister's submissions in relation to the validity of the IFA clause.

Minister

121 On behalf of the Minister, it was contended that the registration of the *Agreement* inclusive of cl 6 would be contrary to or inconsistent with the *Act.* In broad terms, the Minister contended that the IFA clause of the *Agreement* would be contrary to the *Act*, and specifically the following provisions of the *Act*:

(a) s 6, dealing with the objects of the *Act*, most particularly ss 6(ad) and (ag);

(b) s 41, providing that an industrial agreement can only be made between an employer or organisation/association of employers and an organisation/ association of employees;

(c) s 43(1), providing that an industrial agreement may be varied, renewed or cancelled by a subsequent agreement made by and between all the parties to the industrial agreement, being those parties specified in s 41 of the *Act*;

(d) Part VID of the *Act*, providing for EEAs between an employer and an individual employee; and

(e) s 114, prohibiting the contracting out of industrial instruments made under the *Act*, which includes industrial agreements.

122 Having regard to the scheme of the *Act*, in particular the principal objects, and the promotion of collective bargaining and the primacy of collective bargaining over individual arrangements, the Minister submitted that the IFA clause is inimical to these objects, by purporting to allow individual agreement making under the framework of an industrial agreement, without any

statutory protection. The Minister submitted that the statutory object in s 6(ae) of the *Act*, providing an assurance that all agreements registered under the *Act* provide for fair terms and conditions of employment, could easily be circumvented by an IFA. There are no protections, in contrast to those applicable to EEAs under Part VID.

123 Furthermore, consistent with submissions to the same effect by others, there is no capacity within the statutory regime in this jurisdiction, for an employer and an individual employee(s) to purport to vary the effective provisions of an industrial agreement. It is only the parties to an industrial agreement that can do so. The terms of the *Act,* in this jurisdiction, do not contain the equivalent of ss 144 and 202 of the *FW Act*, requiring flexibility terms to be included in a modern award and an enterprise agreement.

124 In support of his submission, the Minister referred to a decision of the Full Bench in ***Confederation of Western Australian Industry (Inc) v West Australian Timber Industry Industrial Union of Workers, South-West Land Division*** (1990) 71 WAIG 15. In that case, the Full Bench dismissed an appeal from a decision of the Commission at first instance, refusing to vary an award to include, by consent, a clause permitting 'enterprise agreements' to be made, between employers and employees directly, providing for flexible working arrangements. We comment on this case further below.

Disposition of cl 6 issue

125 The framework of the *Act* in this jurisdiction is predicated on a system of conciliation and arbitration by which an independent and impartial tribunal, the Industrial Relations Commission, is established and given the authority in s 23 of the *Act*, to 'enquire into and deal with any industrial matter'. The *Act* provides for the registration of organisations of employees and employers in Part II Division 4 and makes detailed provisions as to requirements attaching to organisations and their registration. Once registered, an organisation acquires the status of a body corporate and is, along with its members, subject to the jurisdiction of the Industrial Appeal Court, the Commission and the *Act*.

126 An important provision of the *Act*, s 29(1), deals with standing of persons to refer industrial matters to the Commission. By this provision, an employer with a sufficient interest, and a registered organisation, eligible to enrol persons as members, who are affected by the relevant industrial matter, or the Minister, may do so. The capacity of individual employees to refer industrial matters to the Commission is limited to claims of unfair dismissal, denied contractual benefits or a claim that a 'worker' (as defined) has been bullied or sexually harassed at work.

127 A dispute or industrial matter may be referred to the Commission for a compulsory conference under s 44 of the *Act*, again, by an organisation, employer or the Minister. There is a very limited capacity for an individual employee to refer such matters to the Commission, and only in relation to an entitlement to long service leave.

128 The objects of the *Act* are relevant and important in the statutory scheme. These have been referred to in submissions, and include the promotion of collective bargaining and the primacy of collective agreements over individual agreements in s 6(ad); provision for employers, employees and organisations to reach agreements appropriate to the needs of employers and employees in enterprises and industries, in s 6(ag); to ensure such agreements which are registered under the *Act* contain fair terms and conditions of employment, in s 6(ac); to provide a system of fair wages and conditions of employment in s 6(ca) and to provide for the observance and enforcement of agreements and awards made for the prevention and settlement of industrial disputes in s 6(d). Such objects are of assistance in the construction of provisions of the *Act* and a construction that will promote the purpose or object of the *Act*, is to be preferred to one that would not: s 18 *Interpretation Act 1984* (WA); ***Russio v Aiello*** [2003] HCA 53; (2003) 215 CLR 643.

129 The statutory scheme, by Division 2A of Part II, provides for the making and varying of private and public sector awards. Named parties to awards so made are employers and organisations or associations, who may apply to the Commission to vary an award.

130 By Division 2B of Part II, there are prescribed procedures for the initiation of bargaining for an industrial agreement, again by an organisation or association of employees or an employer or an organisation or association of employers. The Commission may assist the parties in bargaining for an industrial agreement, and, in limited circumstances, may make an order as to terms of the agreement, where the 'negotiating parties' agree for the Commission to do so and the resulting order becomes a term(s) of the industrial agreement. The negotiating parties do not include individual employees.

131 Once agreement is reached, the organisation or association of employees and the employer or association of employers, may seek registration of the agreement by the Commission. An industrial agreement so made may only be varied on the application of an organisation, association or employer party to it.

132 Within this scheme, an individual employee has no standing to make an application for an award or to seek to vary an award. An individual employee has no standing to seek to register, or to vary, an industrial agreement that they will be, or are bound by.

133 The only exception to the framework of awards and industrial agreements set out above, under the *Act*, made between registered organisations and employers, is the ability to make an EEA under Part VID. This is an individual agreement between an employer and an employee that deals with any industrial matter, subject to the requirements of Division 2, which include the application of a 'no disadvantage test' in Division 6. Importantly for present purposes, an EEA, whilst it prevents an award that would otherwise apply to the employee from having any effect, cannot be made while an industrial agreement is in force under the *Act*. This gives clear effect to the objects of the *Act* in s 6(ad), promoting collective bargaining over individual agreements.

134 Of course, there is nothing preventing an employer and an employee from agreeing to more generous terms and conditions of employment, over and above that prescribed by an award or an industrial agreement. What the employer and employee cannot do, however, is to agree to purport to vary, or annul, a provision of an award or industrial agreement, having the effect of altering an obligation imposed by an award or industrial agreement. Any such agreement is void, under s 114 of the *Act*.

135 The IFA clause, proposed to be inserted into the *Agreement*, is at odds with the statutory scheme set out above. It purports to enable a person, as an employee, not a party to the industrial agreement, and therefore not a person who has standing to seek to register an industrial agreement or to seek to vary an industrial agreement, to enter into an 'arrangement' with the employer, who will be a party to the industrial agreement, to purport to vary it. By cl 6.1.a, the 'arrangement' that may be entered into may deal with matters fundamental to the employment relationship such as when work is performed; overtime rates; penalty rates; allowances and leave loadings.

136 Whilst the City of Cockburn contended that cl 6 does not enable a term of the industrial agreement to be varied, as opposed to a variation to its effect, this is not what cl 6.3(d)(i) and (ii) provide. Clause 6.3(d)(i) refers to 'terms of the enterprise agreement that will be *varied by the arrangement* …'. Secondly, cl 6.3(d)(ii) then refers to how the arrangement will *'vary the effect of the term'* (our emphasis). It seems contemplated that such an arrangement may purport to have both effects. The distinction made by the City of Cockburn, between a variation of a term and a variation of the effect of a term, is ultimately a distinction without a difference.

137 Furthermore, whilst the City of Cockburn contended that s 114 has no work to do because cl 6 is not a contract of employment, we have some doubts as to this contention. It is trite that an award or industrial agreement can only operate on an established employer-employee relationship, underpinned by a valid contract of employment. An award or industrial agreement is not the contract of employment, but attaches to it and modifies its terms: ***Mallinson v Scottish Australian Investment Co Ltd*** (1920) 28 CLR 66 at 73; ***Amalgamated Collieries of WA Ltd v True*** (1938) 59 CLR 417 at 423. In particular, we refer to the observations of Latham J in ***Amalgamated Collieries*** at 422–423: '…Thus in every case where an award is applicable it can be said, as in this case, that the worker is entitled to the wages prescribed in the award by reason of the existence of the contract. Every claim for wages, has in this sense, a common law basis'. Whether an 'arrangement' entered into under the IFA clause with an individual employee, also involves a variation to their contract of employment, may depend on the terms of the contract. A clause such as cl 6 may well encourage and unwittingly lead an employer to contravene s 114.

138 A similar situation arose regarding the present question in the context of an award provision purporting to enable an enterprise agreement type arrangement to be entered into under an award, in ***Confederation of Western Australian Industry (Inc)***, as noted above. In this case, the Commission at first instance refused to vary the Timber Workers Award to insert a clause into the award enabling employers and employees at an enterprise, work site or section of the same to reach agreements providing for more flexible work arrangements. It was intended that such flexibility arrangements may involve a departure from the award provisions and any inconsistency between such an agreement and the award would result in the agreement prevailing.

139 On appeal, the Full Bench considered that the Commission was correct to refuse to vary the award to include the enterprise agreements clause. The Full Bench considered that to do so would be inconsistent with the scheme of the *Act*. In particular, it would purport to enable persons not party to the award to vary it when such variation was not authorised by the terms of the *Act*. The Full Bench also took the view that the effect of the clause would be to delegate the Commission's jurisdiction to persons not authorised and would also provide a mandate to contravene s 114 of the *Act*, precluding contracting out. The Full Bench also observed that the only agreements that could be entered into between the industrial parties and which are enforceable under the *Act* (at that time) were industrial agreements made under s 41. These agreements had to be registered by the Commission and were subject to the terms of the *Act*.

140 Later, in ***Ngala Family Resource Centre and Ors v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Division*** (1996) 77 WAIG 2551 a question also arose on appeal to the Industrial Appeal Court from a decision of the Full Bench upholding an appeal from a decision of the Commission at first instance about the insertion of an 'enterprise flexibility provision' into a series of awards. The part of the clause that was rejected enabled the employer and an employee or a group of employees covered by the award, to reach an agreement about terms that may be inconsistent with a provision of the relevant award. No application was required to be made under the then s 40 of the *Act* by a party bound by the award to vary it.

141 The Full Bench held that such a clause was impermissible under the *Act.* On the appeal to the Court, in his reasons, Anderson J (Franklyn J agreeing) referred to this conclusion by the Full Bench in the following terms at 2553:

> It was essentially on this ground that the Full Bench upheld the appeal and rejected the clause, although the Full Bench gave more expansive reasons for so doing. These reasons included the following statements—
>
> > "...an integral part of enterprise bargaining comprises of registered organisations who are parties to the award. Further, the award which underpins enterprise bargaining is inextricably linked to the process. In other words enterprise bargaining does not occur and is not separate from the existence of an award."
> >
> > "...the (Wage Fixing) Principles acknowledge and support an award based concept involving registered organisations which are, as the appellant is, a party to the awards sought to be varied and which are parties to such awards by right of constitutional coverage of employees subject to the awards. An award cannot be sought to be varied except by an organisation or association named as party to it (or an employer who is bound by the award)...No one else can apply for variation."
> >
> > "The Commissioner inserted a clause in this case which purports to exclude the applicant being engaged in negotiations with employers to achieve enterprise agreements. To do so is to provide a mechanism which might exclude an organisation which is party to the award and represents employees covered by the award doing what it is entitled to do. The orders really set out to create workplace agreements outside the framework of that Act (the Workplace Agreements Act 1993), notwithstanding that in this State there are two separate systems, one the workplace agreement system created by the Workplace Agreements Act 1993, and the other, the award based system to which the Wage Fixing Principles apply."
> >
> > "The only way in which a variation to the award can be made on behalf of employees is by the applicant. The only way in which a s41 agreement, which reflects an enterprise bargaining agreement, can be registered on

> behalf of employees is by the applicant. The clause inserted purported to provide a mechanism for employees to enter into agreements themselves with an employer to the exclusion of the appellant. There is no provision in the Act to enable this to occur. There is no provision within the (State Wage Fixing) Principles to enable this to occur. The Principles...enable only s41 agreements or award variations to reflect an enterprise bargaining agreement. Both mechanisms are only valid and enforceable because the Act provides for them. The clause is therefore contrary to the Principles."

142 After considering the grounds of the appeal, Anderson J concluded as to the impugned provision at 2554:

> In my opinion, it does seem out of keeping with the present long standing legislative framework to have in an industrial award binding upon a union and to which the union is a principal party a provision which contemplates that the award may be varied on the striking of an agreement with a body of persons not a principal party to the award—especially as some of the body may be wholly opposed to the agreement. This seems to me to be, with respect, inimical with the award based system provided for in the *Industrial Relations Act* as that Act presently stands.
>
> Whilst there may be, outside of the award system created by the Industrial Relations Act, through the medium of the Workplace Agreements Act, a means whereby substantially the same result can be achieved the question is whether it is a proper exercise of discretion on the part of the Commission to import into the award based system a non-union stream, by the device of award amendment.

143 And further, Anderson J said at 2554:

> In my opinion a provision such as that which was inserted by the Commission at first instance into these awards takes enterprise bargaining at enterprise level well beyond the warrant provided in the State Wage Fixing Principles and does run counter to the main features of the award based system laid down by the Act and to the principal objects of the Act. By force of the Act it is absolutely necessary that the union must be heard upon any application for an award variation or upon any application for registration of a s41 agreement; therefore I do not see how it could possibly "promote goodwill in industry" (s6(a)), "encourage, and provide means for, conciliation with a view to amicable agreement thereby preventing and settling industrial disputes" (s6(b)), "provide means for preventing and settling industrial disputes...with the maximum of expedition..." (s6(c)), "provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes" (s6(d)) to effectively shut the union out of negotiations in respect to amendments to its own award, allowing it to be heard only at the stage of formal application for variation or registration and then only if its opposition should be held not "unreasonable". It enables an industrial outcome to be achieved which is coercive and enforceable against the union, and employees who are or are eligible to be members of the union, without union involvement and by amendment to the union's own award through an agreement to which the union is not a party. There seems to me good reason to hold that within a legislative framework containing a statement of the objects recited above, a system of wage fixing by award variation which substantially excludes a party to the award from the process of negotiation is a system which is incomplete and less than whole.

144 Whilst in ***Ngala***, at the material time, enterprise bargaining was the subject of a specific principle in the Commission's Wage Fixing Principles, the underlying concepts dealt with by both the Full Bench and the Court are directly relevant to this matter. As in both ***CWAI*** and ***Ngala***, in our view, the IFA clause in this matter purports to enable persons who will not be parties to the industrial agreement, to vary it. This is, for the same reasons as expressed in the above two cases, inconsistent with the scheme for making and varying industrial agreements under the *Act* and is not permissible.

145 Accordingly, registration of the *Agreement* containing cl 6 – Individual Flexibility Arrangements would be inconsistent with the *Act.*

Would the above clauses in the *Agreement*, if registered, be invalid and of no effect?

146 Given our conclusion that registration of the *Agreement* with cl 5 would not be contrary to the *Act*, but the inclusion of cl 6 would be, it is only necessary to comment on the latter provision. The WASU, the LGRCEU, and CFMEUW submitted that cl 6 would be invalid if contained in the *Agreement*, if registered. The Minister contended that such a clause would be arguably void, having regard to s 114 of the Act.

147 In our view, cl 6, if included in the *Agreement* for registration, would be invalid and of no effect.

Can the Commission, before registering the *Agreement* under s 41(2) of the *Act*, require the parties to effect a variation for a purpose other than 'giving clear expression to the true intention of the parties' under s 41(3) of the *Act*?

City of Cockburn

148 As to this question, the City of Cockburn referred to an earlier decision of the Full Bench in ***Construction, Forestry, Mining and Energy Union of Workers v Sanwell Pty Ltd and the Chamber of Commerce and Industry of Western Australia*** [2004] WAIRC 10947; (2004) 84 WAIG 727. It was submitted that the majority reasons in that case referred to the very limited role of the Commission in relation to the registration of industrial agreements. At [44], Sharkey P and Gregor C observed:

> S41 provides, as we have said, the mechanism for and power of registration of industrial agreements. One noteworthy feature of it is the very limited role of the Commission. The Commission, with one or two exceptions, exists solely to register the agreement reached by the prescribed parties.

149 The City of Cockburn also made reference to the majority's observation at [51] as follows:

> It is to be noted that, subject only to s41(3), s41A and s49N of the Act, where the parties to a s41(1) agreement apply to the Commission for registration of the agreement as an industrial agreement, the Commission shall register the agreement (see s41(2)) (our emphasis). That is, there is a mandatory requirement by the use of the word "shall" that the Commission register such agreement, and that is the Commission's function primarily, under s41.

150 Additionally, the City of Cockburn referred to the joint reasons at [144], where it was observed that:

> *The Act* allows the parties, not the Commission, to judge the content of the agreement. It furthers the objects of *the Act* if they do. They judge the conditions, rights, objects and subject matter. However, the agreement must be an agreement in the terms prescribed by s41 of *the Act*.

151 Accordingly, the City of Cockburn contended that the parties to the *Agreement* have given clear expression to their terms and no variations are necessary. Given the limitations imposed on the Commission under s 41(3) of the *Act*, the answer to this question should be 'no'.

WASU

152 On behalf of the WASU, it was submitted that whilst under s 41(3) of the *Act* in the registration of an industrial agreement, the Commission can only require the parties to vary it to given clear expression to the true intention of the parties, this involves an objective test. As we understood the submission, it was contended that s 41(3) requires the Commission to assess the parties' objective intention, based upon the content of the agreement proposed for registration. For example, where a proposed industrial agreement contains unlawful or invalid terms, such as terms prohibiting an employer from employing people with a particular protected trait, for example gender, sexual orientation, race, etc. The WASU submitted that objectively, no party to such an agreement could intend it to be registered containing such unlawful or invalid terms.

153 On this basis, the WASU submitted that the Commission could require the parties to the industrial agreement to vary it, to give effect to their 'true intention' to not include unlawful terms, in the exercise of the power under s 41(3) of the *Act*.

154 The WASU made reference to a decision of Parks C in ***Australian Workers Union, West Australian Branch, Industrial Union of Workers v Life Be In It*** (1994) 74 WAIG 2342. In that case, Parks C declined to register an industrial agreement under s 41 of the *Act* because at, cl 4, it contained a provision to the effect that the agreement would prevail over the terms of a federal award, notwithstanding the terms of s 152 of the then *Industrial Relations Act 1988* (Cth). This provided that where a State law, order, award, decision or a determination of a State industrial authority was inconsistent with a matter dealt with in a federal award, the latter prevailed to the extent of the inconsistency. Commissioner Parks concluded that the agreement was invalid to the extent that it purported to prevail over the federal award and declined to register the agreement until that provision was removed. He considered that the obligation on the Commission to register an industrial agreement, is subject to an assessment of its validity and the absence of any unlawful terms.

155 In the present context, it was therefore submitted that on the basis that cl 6 of the *Agreement* would be invalid if registered, it would be open for the Commission to require the parties to give true effect to their intentions under s 41(3), and if they did not do so, it would be open to the Commission to refuse to register the *Agreement* under s 41(2).

156 We note, however, that the questions of law before the Full Bench do not involve clauses alleged to be unlawful as being discriminatory. The Full Bench is confined by the referral as to whether cl 6 would be inconsistent with the *Act* if the *Agreement* was registered with it, and whether the Commission may vary the *Agreement* under s 41(3) of the *Act*, by requiring its removal as a condition of registration.

LGRCEU

157 The LGRCEU submitted that ultimately the answer to this question must be 'no'. Reference was made to s 41(3) of the *Act*, to the effect that the Commission is unable to impose its own views or change the character of an agreement submitted for registration as an industrial agreement. Reference was also made to the decision of the Full Bench in ***Sanwell*** in this regard. However, it was contended that the Commission is still required to scrutinise an agreement submitted for registration to ensure that it is compliant with the *Act*. However, this does not expand the permissible scope of s 41(3) and that is the limit of the Commission's power in relation to variations to an agreement submitted for registration.

CFMUEW

158 The CFMEUW's overarching submission was that the Commission is unable to require the parties to vary an industrial agreement, except for the circumstances provided for in s 41(3). This was subject to further submissions, not dissimilar to those put by the WASU, to the effect that, where an agreement contains unlawful and discriminatory clauses, for example, or clauses that may be contrary to the *Act*, there is a question as to whether in those circumstances, the parties truly intend to register an agreement in those terms. In this respect, reference was made to the interpretive principle of the presumption of legality of legislation, and that courts generally should not, absent clear words, impute to the Parliament an intention to allow the registration of an industrial agreement that contains unlawful terms. This was said to apply because, once registered, an industrial agreement is given legislative effect under the *Act*, and may be enforced as an industrial instrument.

159 Thus, as the submission went, the CFMEUW contended that the Commission should be reluctant to register an agreement that contains invalid clauses or otherwise undermines the framework of the *Act*. A further submission was made by the CFMEUW in reliance upon ***Sanwell***. In referring to this decision of the Full Bench, the submission was made that the Commission must be satisfied that the agreement terms are truly an agreement capable of registration under s 41. As we understood the submission, it was contended that the decision of the Full Bench in ***Sanwell,*** relying upon the decision of the Full Court in ***AFMEPKIU v Electrolux Home Products Pty Ltd*** (2002) 115 IR 102, concluded that it was permissible for the Commission to register an industrial agreement under s 41 of the *Act,* even if it contained matters which are not 'industrial matters' for the purposes of s 7.

160 As a consequence of the High Court decision overturning the Full Federal Court decision in the ***Electrolux*** case, some months after the Full Bench decision in ***Sanwell***, the ***Sanwell*** decision must now be open to question. The High Court in ***Electrolux Home Products v Australian Workers Union*** [2004] HCA 40; 221 CLR 309 concluded that an enterprise agreement that contained provisions not pertaining to the relationship of an employer and an employee could not be the subject of certification under the then federal legislation.

161 The CFMEUW contended that substantive, but discrete provisions, not pertaining to that relationship, cannot be included in such an agreement. It was suggested that cl 5, read with the *Agreement* as a whole, in view of the High Court decision in ***Electrolux***, may mean the *Agreement* is not one with respect to an industrial matter. This submission was predicated on the submission that the clause is directed at the bare exclusion of State law.

162 Whilst it was not referred to in either the majority or minority reasons in ***Sanwell,*** on the same basis, in ***The Banks case***, Brinsden J concluded at 2090-2091 to a similar effect, that not all provisions in an industrial agreement need to be industrial matters. For the above reasons, respectfully, this conclusion may also be open to question. We also refer to ***Hanssen Pty Ltd v Construction, Forestry, Mining & Energy Union*** [2004] 84 WAIG 694, where the Full Bench reached the same conclusion as in ***Sanwell***.

163 However, given these proceedings are not directly concerned with this issue, which is an important one, and an answer to the question will depend on a construction of the particular provisions of the *Act* and those of the Commonwealth statute the subject of the decision in ***Electrolux***, this matter is best left to another occasion when it can be fully argued and considered (See too ***Re Harrison; Ex parte Hames*** [2015] WASC 247 per Beech J at [81]-[82]). Until these authorities are fully reconsidered, we proceed on the basis that the ***Banks case***, and ***Sanwell*** and ***Hansen*** remain good law in this jurisdiction.

Minister

164 On behalf of the Minister, it was submitted that there is no capacity for the Commission to require the parties to affect a variation to an agreement, other than for the purposes specified in s 41(3) of the *Act*. The Minister also referred to ***Sanwell***, and the observations of the Full Bench in that case, as to the very limited role of the Commission in the registration of industrial agreements.

165 The Minister also referred to the legislative history of s 41 and, in particular, the 1993 amendments, that we have considered above, to remove the Commission's ability to require parties to vary an industrial agreement in relation to inconsistency with an award of the Commission. The Minister also submitted that even if the Commission does request the parties to make a variation under s 41(3), whether the parties do or not and whether they decide to proceed with the registration of the industrial agreement is up to them: ***The Banks case*** per Brinsden J at 2087.

Disposition of variation issue

166 For the following reasons, the answer to this question must be no. In the ***Banks case***, an application was made to register an industrial agreement in relation to the banking operations of the employer. Whilst the matters raised by the grounds of appeal in that case do not directly bear upon the issues to be decided in these proceedings, the Court, in the determination of the appeal, made some observations as to s 41 of the *Act*, as it then was. At the time of the matter before the Commission at first instance, the Full Bench on appeal and the Court, s 41 was in the terms as we have noted at [97] of our reasons above.

167 Justice Brinsden (Kennedy and Rowland JJ agreeing), after setting out s 41 of the *Act* as it then was, said:

> My construction of the above subsections is this. The parties to an agreement in respect of an industrial matter if it be their wish may apply for registration of that agreement as an industrial agreement. If the agreement is not contrary to the particular matters referred to in subsection (2) the Commission is bound to register that agreement as an industrial agreement. The only modification upon that obligation is as is provided in subsection (3). Even then the parties may not be prepared to proceed with the application as varied pursuant to such a requirement, the matter of registration being entirely for them.

168 In his reasons, Rowland J also observed at 2091 as follows:

> By section 41 of the Industrial Relations Act 1979 ("the Act"), if the parties agree and there is no other impediment contained in the Act, then there is no discretion in the Commissioner to refuse registration of the agreement.

169 We have already referred to the decision of the Full Bench in ***Sanwell***. The Full Bench referred to the mandatory requirement on the Commission to register an agreement as an industrial agreement, subject to ss 41(3), 41A and 49N. The latter provisions are not relevant to these proceedings. As to s 41(3), Sharkey P and Gregor C said at [56]:

> The registration is, of course, subject to s41(3) of the *Act*, which empowers the Commission, by the use of the word "may", to require the parties thereto to effect such variation as the Commission considers necessary or desirable for the purpose of giving clear expression to the true intention of the parties. It is to be noted, of course, that that is a very limited power and is directed not to the alteration of the agreement, save and except to give it clear expression so that the true intention of the parties who make the agreement is reflected in it (see s56 of the *Interpretation Act 1984* (as amended)).

170 In our view, the legislative history, that we have set out above, tells against a residual power in the Commission, as contended by some of the submissions, to require variation other than for the purposes of s 41(3), or to refuse registration of an industrial agreement at all, because of the content of the agreement. It is clear from the legislative history, read with the plain terms of s 41(2) of the *Act*, that Parliament intended to remove most restrictions on the registration of industrial agreements and impose only the most minimal role upon the Commission. Provided the agreement answers the description set out in s 41(1) of the *Act* and meets the requirements of s 41A, then the mandatory obligation imposed by s 41(2) on the Commission, if satisfied the minimal conditions for registration are met, is to register the agreement as an industrial agreement.

171 The requirement for making and varying awards, as in the ***CWAI case*** and the ***Ngala case***, is of course different. In those cases, as we have set out earlier in these reasons, the matters concerned the exercise of a discretionary power to vary an award by the Commission. Whilst those cases dealt with similar provisions to the IFA clause in cl 6, that purported to enable persons not bound by the award to vary it, the Commission was able to exercise its discretion to refuse the variation in those circumstances, as being inconsistent with the *Act*. By way of contrast, as to the registration of industrial agreements under the *Act*, this was one of the very limitations removed from s 41 by the Parliament in 1993.

172 However, given the conclusions we have reached as to the IFA clause, it would be expected that such provisions do not find their way into industrial agreements in this jurisdiction. Such provisions may well lead employers into a contravention of s 114 of the *Act* and expose them to enforcement action under s 83 of the *Act*.

Answers to the referred questions of law

173 Based on our reasons, we answer the questions of law referred as follows:

(2)(a) - No.

(2)(b) - Yes.

(2)(c) - As to clause 6, yes.

(2)(d) - No.

2023 WAIRC 00797

QUESTIONS OF LAW REFERRED TO FULL BENCH

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CITY OF COCKBURN **APPLICANT** **-v-** THE WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES AND THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION **RESPONDENTS** MINISTER FOR INDUSTRIAL RELATIONS, THE WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION AND THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS **INTERVENORS**
CORAM	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
DATE	FRIDAY, 6 OCTOBER 2023
FILE NO.	FBM 1 OF 2023
CITATION NO.	2023 WAIRC 00797

Result	Order issued	
Representation		
Applicant	:	Ms H Millar of counsel and with her Ms K Groves of counsel
WALGA	:	Ms R Miller as agent
WASU	:	Mr C Fogliani of counsel
LGRCEU	:	Mr K Trainer as agent
Intervenors		
Minister	:	Mr R Andretich of counsel
CFMEUW	:	Mr TJ Dixon of counsel with him Mr J Nicholas of counsel

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Order

This referral of questions of law having come on for hearing before the Full Bench on 16 August 2023, and having heard Ms H Millar of counsel on behalf of the applicant, Ms R Miller as agent on behalf of the Western Australian Local Government Association, Mr C Fogliani of counsel on behalf of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, Mr K Trainer as agent on behalf of the Local Government, Racing and Cemeteries Employees Union, Mr R Andretich of counsel on behalf of the Minister for Industrial Relations and Mr TJ Dixon of counsel on behalf of the Construction, Forestry, Mining and Energy Union of Workers, and reasons for decision having been delivered on 3 October 2023, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that –

The questions of law be answered as follows –

(2)(a) - No.

(2)(b) - Yes.

(2)(c) - As to clause 6, yes.

(2)(d) - No.

By the Full Bench

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

COMMISSION IN COURT SESSION—Awards/Agreements—Variation of—

2023 WAIRC 00802

REVIEW OF CLEANERS AND CARETAKERS AWARD, 1969 SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	:	2023 WAIRC 00802
CORAM	:	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
HEARD	:	FRIDAY, 6 OCTOBER 2023
DELIVERED	:	CICS 4 OF 2023
FILE NO.	:	COMMISSION'S OWN MOTION
BETWEEN	:	Appellant AND (NOT APPLICABLE) Respondent

Catchwords	:	Industrial Law (WA) – Commission's Own Motion – s 37D – Variation to scope of private sector award – Connected to the State of Western Australia – Express application to labour hire organisations – s 37C – Whether proposed variations extend to and bind employee and employer covered by public sector award for purpose of s 37C(3) – Criteria for reducing the scope of the Award under s 37D(5) – Award scope varied
Legislation	:	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA)
Result	:	Award varied

Representation:

Ms A Kothapalli and Ms M Williams on behalf of the Hon. Minister for Industrial Relations

Dr T Dymond on behalf of UnionsWA

Ms S Lyon on behalf of the Western Australian Local Government Association

Case(s) referred to in reasons:

Commission's Own Motion v (Not applicable) [2023] WAIRC 00801

Reasons for Decision

COMMISSION IN COURT SESSION:

1 In reasons for decision concerning the s 37D review of the *Restaurant, Tearoom and Catering Workers' Award* scope clause, the **Commission** in Court Session set out the process for identifying awards suitable for a scope review, and for reviewing that award's scope: *Commission's Own Motion v (Not applicable)* [2023] WAIRC 00801 (**CICS 5 Reasons**). It also set out the reasons for and intention behind the scope variations which were made to that award.

2 The *Cleaners and Caretakers Award, 1969* was another of the awards identified as suitable for scope review, as a result of the process described in the CICS 5 Reasons.

3 The Commission published notice of the proposed variations to the *Cleaners and Caretakers Award*, and of the opportunity to be heard in relation to them, in the Industrial Gazette and on the Commission's website. It also gave notice to UnionsWA, the Chamber of Commerce and Industry of Western Australia (Inc); (**CCI**), the Australian Resources and Energy Employer Association, formerly known as the Mines and Metals Association the Western Australian Local Government Association (**WALGA**), the **Minister** for Industrial Relations. It directed that the following parties to the Award be given notice:

(a) United Workers Union (WA);

(b) The Roman Catholic Bishop of the Diocese of Perth;

(c) The Anglican Diocese of Perth;

(d) The Returned & Services League of Australia WA Branch Incorporated;

(e) City of Perth;

(f) Town of Cottesloe;

(g) Grand Lodge of Western Australian Freemasons Homes for the Aged Inc;

(h) Uniting Church in Australia Synod of Western Australia; and

(i) Presbyterian Church in Western Australia General Assembly.

4 The Commission directed the above employer parties be given notice, as being a sample of employers which the Commission considered were reasonably representative of the employers who would be bound by the proposed variations.

5 No individual, organisation or employer has advised the Commission of any opposition to the proposed variations. The Minister and UnionsWA told the Commission they supported the proposed variations. WALGA sought additional variations to remove local government employers from the scope of the *Cleaners and Caretakers Award*.

6 The proposed variations adopt changes drafted by Mr Brendon Entrekin and his colleagues from the Department of Mines, Industry Regulation and Safety, Private Sector Labour Relations Division on behalf of the Minister. The Commission is grateful for Mr Entrekin and his colleagues for thevaluable assistance they have provided to the Commission in this regard.

7 It has not been suggested that the *Cleaners and Caretakers Award* contains any obvious gaps in coverage nor that it inadequately defines who is covered by it. It is not suggested that the existing scope clause creates an unintended reduction in scope, nor that it excludes coverage of labour hire arrangements. It is not suggested it creates overlapping award coverage.

8 Accordingly, the proposed amendments are not intended to alter the *Cleaners and Caretakers Award's* coverage. They are intended to clarify and improve the area and scope provisions and in particular to align the format and form with that which it is foreshadowed will be used in other s 37D scope reviews. That is, they are intended to introduce some uniformity.

9 Specifically, the amendments are intended to:

(a) specify that the scope extends to employees who are 'connected to the State of Western Australia' and their employees while performing work covered by the award;

(b) expressly refer to the fact the award applies to labour hire organisations that supply employees to host employers to perform work that is otherwise covered by the award;

(c) expressly state that the award does not apply to employers and employees who are subject to other specified state awards, where the work performed might be similar in nature; and

(d) expressly state that the award does not apply to employers and employees that are national system employers and national system employees under the *Fair Work Act 2009* (Cth).

10 These purposes are common to the rationale and intent of the variations in the CICS 5 Reasons. The CICS 5 Reasons should be referred to for elaboration about the purpose of the variations.

WALGA's proposed further variations

11 WALGA submitted that s 37C(3) of the *Industrial Relations Act 1979* (WA) requires the Commission to make further proposed variations to expressly exclude from the scope of the *Cleaners and Caretakers Award* employers and employees who are covered by the *Local Government Officers' (Western Australia) Award 2021* (LGO Award) and the *Municipal Employees (Western Australia) Award 2021* (ME Award).

12 WALGA made a similar submission in CICS 5 of 2022. The Commission dealt with the submission at [24]-[37] of the CICS 5 Reasons. The Commission said at [33]:

> In order for the Commission to make a variation that stops the Award from extending to and binding local government authorities and their employees, the Commission must be satisfied that another appropriate award will extend to and bind them: s 37D(5).

13 WALGA argues that the Commission can be satisfied that another appropriate award extends to and binds the employees who would otherwise by bound by the *Cleaners and Caretakers Award*. In support of this argument, it asserted that the LGO Award extends to and binds caretakers employed by local government employers under clauses 19.8 and 20.2 of the LGO Award. Clause 19.8 deals with ordinary hours of work, and expressly refers to 'Caretakers and Caravan Park Managers'. Clause 20.2 sets out a loading paid to 'Caretakers' for hours worked between midnight and 5.00 am. These are the only references in the LGO Award to caretakers.

14 WALGA did not expressly specify what classification of the LGO Award applies to caretakers. Nor did WALGA attempt to provide a comparison of the terms and conditions for employees employed as caretakers under the LGO Award and the *Cleaners and Caretakers Award*.

15 WALGA says the ME Award extends to and binds employees employed as cleaners by local government employers: cl 20.1.2(4)(c).

16 The Minister and UnionsWA each point out that it is not clear what classification would apply to a cleaner under the ME Award. If the Level 1 classification is applied, the base rate of pay under the ME Award is lower than the base rate of pay in the *Cleaners and Caretakers Award*, and therefore, excluding them from the scope of the *Cleaners and Caretakers Award* would be to the detriment of those employees.

17 The Commission did not have the benefit of comprehensive submissions about what test applies to determine whether, if another award applies, it is an 'appropriate' award for the purpose of s 37D. As the Minister and UnionsWA point out, it is

arguable that if the terms of another award compare less favourably, that would disqualify the other award as being 'appropriate'.

18 In the absence of fulsome argument on this issue, and potentially also a comprehensive analysis of comparative terms and conditions, it is inappropriate to reduce the scope of the *Cleaners and Caretakers Award* to exclude local government employees on this occasion.

19 As WALGA is not party to the *Cleaners and Caretakers Award,* it does not have standing to apply to vary it. However, there are local government employers who are parties and who have standing. There is therefore the ability for applications to be made by one or more of those employers in future if they consider they are in a position to address and satisfy the test under s 37D. Our decision in this matter is not intended to preclude future variation applications.

Conclusion and Order

20 The Commission orders that the *Cleaners and Caretakers Award* be amended in accordance with the Schedule attached to these reasons, such variations to take effect from the date of the Commission's order.

SCHEDULE

1. Delete Clause 1.3 **Area and Scope** and substitute with a new Clause 1.3 **Area and Scope** as follows:

1.3. – AREA AND SCOPE

1.3.1.

(1) This Award has effect throughout Western Australia.

(2) This Award has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this Award.

Note: for a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see s 3(2) of *the Industrial Relations Act 1979*. Indicators include but are not limited to, whether the employer is:

- domiciled or resident in, or has a place of business in, the State; or
- registered, incorporated, or established under a law of the State; or
- the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority.

1.3.2. This Award applies to all employees in the classifications set out in Clause 3.1 - Wages who are employed by private sector businesses, community and religious organisations, clubs and societies, and local government, as well as to their employers.

1.3.3. This Award also applies to employers that supply labour on an on-hire basis to host employers in respect of on-hire employees employed in the classifications provided in Clause 3.1 - Wages.

1.3.4. Notwithstanding the provisions of this clause, this Award does not apply to any employee who:

(1) carries out the duties of a verger in a church; or

(2) is otherwise subject to the terms and conditions of the:

(a) Cleaners and Caretakers (Car and Caravan Parks) Award 1975;

(b) Contract Cleaners Award, 1986; or

(c) Security Officers' Award.

1.3.5. This Award does not apply to employers and employees who are subject to the national industrial relations system.

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23 WAIRC 00801

REVIEW OF RESTAURANT, TEAROOM AND CATERING WORKERS' AWARD SCOPE CLAUSE PURSUANT TO S 37D OF THE INDUSTRIAL RELATIONS ACT 1979 (WA)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

COMMISSION IN COURT SESSION

CITATION	**:**	2023 WAIRC 00801
CORAM	**:**	CHIEF COMMISSIONER S J KENNER SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL
HEARD	**:**	WEDNESDAY, 6 SEPTEMBER 2023
DELIVERED	**:**	FRIDAY, 6 OCTOBER 2023
FILE NO.	**:**	CICS 5 OF 2022
BETWEEN	**:**	COMMISSION'S OWN MOTION Applicant AND (NOT APPLICABLE) Respondent

Catchwords	**:**	Industrial Law (WA) – Commission's Own Motion – s 37D – Variation to scope of private sector award – Replacement of outdated terms – Connected to the State of Western Australia – Express application to labour hire organisations – s 37C – Whether proposed variations extend to and bind employee and employer covered by public sector award for purpose of s 37C(3) – Criteria for reducing the scope of the Award under s 37D(5) – Award scope varied
Legislation	**:**	*Fair Work Act 2009* (Cth) *Industrial Relations Act 1979* (WA) *Industrial Relations Legislation Amendment Act 2021* (WA)

Result : Award varied

Representation:

Ms A Kothapalli and Ms M Williams on behalf of the Hon. Minister for Industrial Relations

Dr T Dymond on behalf of UnionsWA

Ms S Lyon on behalf of the Western Australian Local Government Association

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Case(s) referred to in reasons:

Parker v Transfield [2001] WASCA 233

Reasons for Decision

COMMISSION IN COURT SESSION:

1 The *Industrial Relations Legislation Amendment Act 2021* (WA) introduced a new power for the Western Australian Industrial Relations **Commission** to vary the scope of private sector awards of its own motion: s 37D of the *Industrial Relations* ***Act*** *1979* (WA).

2 Following the commencement of this new provision, the Commission invited UnionsWA, the Chamber of Commerce and Industry of Western Australia (Inc); (**CCI**), the Australian Resources and Energy Employer Association, formerly known as the Mines and Metals Association (**AREEA**), the Western Australian Local Government Association (**WALGA**), the **Minister** for Industrial Relations and other interested parties to consult with it, to identify awards suitable for scope review.

3 The *Restaurant Tearoom and Catering Workers'* ***Award*** was one of the awards identified as a result of the consultation process. Accordingly, the Commission, of its own motion, commenced this proceeding for variations to the Award's scope.

4 Section 37D provides:

> (1) Except as provided in this section, the Commission may vary the scope of a private sector award of its own motion.
>
> (2) A variation must not be made in relation to —
>
> (a) an application under section 50(2) that does not seek the variation of the scope of the private sector award; or
>
> (b) a State Wage order under section 50A.
>
> (3) A variation must specify that the scope of the private sector award extends to and binds —
>
> (a) employers of a class or classes specified in the award, whether or not the employers are also specified by name in the award; and
>
> (b) employees —
>
> (i) of employers referred to in paragraph (a); and
>
> (ii) of a class or classes specified in the award.
>
> (4) For the purposes of subsection (3)(a) and (b)(ii), the class may be described by reference to —
>
> (a) a particular industry or part of an industry; or
>
> (b) a particular kind of work.
>
> (5) A variation that stops the private sector award from extending to and binding particular employers or employees must not be made unless the Commission is satisfied that another appropriate award will extend to and bind them.
>
> (6) The Commission must not make a variation under this section until it has —
>
> (a) published the proposed variation in the required manner; and
>
> (b) given notice of the proposed variation to —
>
> (i) UnionsWA, the Chamber, the Mines and Metals Association and the Minister; and
>
> (ii) any organisations, associations and employers as the Commission may direct (being, in the case of employers, employers constituting, in the opinion of the Commission, a sufficient number of employers reasonably representative of the employers who would be bound by the proposed variation);
>
> and
>
> (c) afforded the persons or bodies referred to in paragraph (b) an opportunity to be heard in relation to the proposed variation.

5 The Commission published notice of the proposed variations that are the subject of these reasons, and of the opportunity to be heard in relation to them, in the Industrial Gazette and on the Commission's website. It also gave notice to UnionsWA, the CCI, AREEA, WALGA, and the Minister. It directed that the following parties to the Award be given notice:

(a) United Workers Union (WA);

(b) Restaurant and Catering Industry Association of Employers of Western Australia Inc;

(c) Western Australian Hotels and Hospitality Association Inc.;

(d) City of Perth; and

(e) City of Stirling.

6 Additionally, a sample of employers which the Commission considered were reasonably representative of the employers who would be bound by the proposed variation, were also given notice of the proposed variations and the opportunity to be heard in relation to them.

7 No individual, organisation or employer has advised the Commission of any opposition to the proposed variations. The Minister and UnionsWA told the Commission they supported the proposed variations. WALGA sought additional variations to remove local government authorities from the scope of the Award.

8 The purpose of these reasons is to explain the rationale and intent of the proposed variations.

9 The proposed variations adopt changes drafted by Mr Brendon Entrekin and his colleagues from the Department of Mines, Industry Regulation and Safety, Private Sector Labour Relations Division on behalf of the Minister (**the Department**). The Commission is grateful for Mr Entrekin and his colleagues for the valuable assistance they have provided to the Commission in this regard.

10 It has not been suggested that the Award contains any obvious gaps in coverage nor that it inadequately defines who is covered by it. It is not suggested that the existing scope clause creates an unintended reduction in scope, nor that it excludes coverage of labour hire arrangements. It is not suggested it creates overlapping award coverage.

11 Accordingly, the proposed amendments are not intended to alter the Award's coverage. They are intended to clarify and improve the area and scope provisions and in particular to align the format and form with that which it is foreshadowed will be used in other of s 37D of the Act scope reviews. That is, they are intended to introduce some uniformity.

12 Specifically, the amendments are intended to:

(a) replace outdated terms with more contemporary terms;

(b) specify that the scope extends to employees who are 'connected to the State of Western Australia' and their employees while performing work covered by the Award;

(c) expressly refer to the fact the Award applies to labour hire organisations that supply employees to host employers to perform work that is otherwise covered by the Award;

(d) expressly state that the Award does not apply to employers and employees who are subject to other specified state awards, where the work performed might be similar in nature; and

(e) expressly state that the Award does not apply to employers and employees that are national system employers and national system employees under the *Fair Work Act 2009* (Cth).

Contemporising the terminology

13 The proposed variation adopts the term 'restaurant and catering industry' on the basis it is a more contemporary and inclusive term to describe the industry covered. Similarly, 'classification' better reflects contemporary terminology than 'callings'. The proposed new definition of 'restaurant and catering industry' includes restaurants and cafes, rather than just 'fish cafes', tearooms rather than 'tea shops', canteens (which would include school canteens) and takeaway and fast food outlets excluding those covered by the *Fast Food Outlets Award 1990*. The proposed new definition also includes catering establishments, so that the industry definition is comprehensive.

14 The proposed new definition removes reference to grill rooms, oyster shops and hamburger shops on the basis that these establishments are captured by the definition without specific reference to them.

15 It is proposed to replace the definition of 'catering contractor' with 'catering employer', for simplicity.

Connected to the State of Western Australia

16 The Department pointed out that the words in the current scope clause 'throughout the state of Western Australia' appear on their face to suggest the Award coverage is limited to the geographic area of Western Australia.

17 According to the Department, Wageline frequently receives queries regarding Western Australian employers in the state jurisdiction who employ persons to perform work residing interstate or overseas.

18 In ***Parker v Transfield*** [2001] WASCA 233, the Industrial Appeal Court found that an employee who worked entirely overseas for a Western Australian business was nevertheless covered by a state award on the basis that there was a real connection with Western Australia considering:

(a) the employer's principal business was within Western Australia;

(b) the contract of employment was made within Western Australia;

(c) payment of the employee's salary was made in Western Australia;

(d) repatriation on completion of a project was made to Western Australia; and

(e) the employee's dismissal occurred while he was in Western Australia.

19 The proposed new wording is intended to make it clear that the Award may have extra territorial effect with respect to interstate and overseas employees of state system employers.

20 As suggested by the Department, a guidance note will also be included to provided further information on this issue.

Labour hire organisations

21 While the existing scope clause does not expressly state that it covers employees employed by labour hire organisations, it appears that the scope of the Award is sufficiently broad to cover such employees whose labour is supplied by a third party to the extent that the employees are employed in the contract cleaning industry.

22 The proposed variations therefore do not alter the coverage of the Award nor extend its scope. However, the variations are considered desirable for clarity and consistency with the approach adopted in most modern awards under the *Fair Work Act 2009* (Cth).

Other variations

23 Similarly, the balance of the proposed variations do not affect the scope of the Award in a practical way but rather are considered desirable for clarity, to make the Award more user friendly and to align with the format and form foreshowed for other awards' scope reviews.

WALGA's proposed further variations

24 WALGA submitted that s 37C(3) of the Act requires the Commission to make further proposed variations to expressly exclude from the scope of the Award employers and employees who are covered by the *Local Government Officers' (Western Australia) Award 2021* (**LGO Award**) and the *Municipal Employees (Western Australia) Award 2021.*

25 Section 37C(3) provides:

> A private sector award must not be made or varied to extend to and bind an employee and an employer if a public sector award or enterprise award extends to and binds the employee and employer.

26 WALGA's reasoning was that these two local government awards were public sector awards that extend to and bind employees employed in a calling specified in an award in the industry to which the award applies and employers employing those employees: ss 7(1) and 37A.

27 There is no dispute that the local government awards are public sector awards, nor that the Award is a private sector award. Section 37C(3) applies.

28 As the Minister pointed out, the word 'vary' in relation to an award is defined in the Act to mean to add a new provision or to add to, alter, amend or rescind an existing provision. So, when s 37C(3) refers to a variation to extend and bind an employee and an employer, it refers to altering or amending an existing scope provision in such a way as to extend to and bind an employee and employer otherwise bound by a public sector award. It is not enough to merely alter or amend the existing provision. The alteration or amendment must result in the award becoming binding on the employee and employer otherwise covered by another award.

29 The proposed variations do not extend the coverage of the Award. The variations do not result in the award becoming binding on any employer or employee not already bound by it. There is no variation with respect to the application of the award to local governments or their employees.

30 Perhaps recognising this, WALGA did not expressly argue that s 37C(3) prevents the Commission from varying the Award as proposed. Rather, it submitted that s 37C(3) of the Act requires the Commission to make further amendments to the proposed variations.

31 Section 37C(3) is only enlivened if the relevant public sector awards extend to and bind the particular employees which the Award would otherwise extend to and bind. The purpose of s 37C is to ensure that the Award is not extended to catering employees if there is a public sector award covering those same catering employees, that binds the employees and their employer: see Industrial Relations Legislation Amendment Bill Explanatory Memorandum at para 128 and para 136.

32 What WALGA sought was in substance a variation of the type mentioned in s 37D(5) of the Act, that is, to stop the Award from extending to and binding employers and employees who are bound by the local government awards.

33 In order for the Commission to make a variation that stops the Award from extending to and binding local government authorities and their employees, the Commission must be satisfied that another appropriate award will extend to and bind them: s 37D(5).

34 WALGA suggested that wait and bar staff, chefs, cooks, kitchen and catering staff, baristas and counter staff employed in local government cafes, recreation centres community dining halls and meals on wheels services were Community Service Officers (Welfare and ancillary services) and Community Service Officers (recreation) as defined in the LGO Award. WALGA did not elaborate on how such employees fell within those defined terms, or what LGO Award classification applied to them.

35 The relevant LGO Award definitions are:

> 43 Community Services Officer (Welfare and ancillary services) shall mean a person engaged by a respondent whose role is to encourage, promote or conduct community pursuits and whose aim is the maintenance or improvement of general social and living standards with regard to family support, services, income, welfare, employment, education, health, housing, children, youth, aged and domiciliary services, or who is primarily concerned with the social and living standards in the community and shall include an Assistant Community Services Officer.
>
> 44 Community Services Officer (recreation) shall mean a person engaged by a respondent whose role is to initiate, coordinate, encourage, promote or conduct recreational activities within a community and shall include an assistant in relation to such functions and recreation centre and swimming pool staff. Provided that this definition does not include a person employed in a clerical capacity, for example Cashier/Receptionist in a Recreation/Aquatic Centre.

4.8 Officer or Employee shall mean a person appointed by a Local Authority to one of the classifications in this award, a person engaged by a Local Authority as a Trainee in accordance with Clause 16. – National Training Wage, and any other person appointed by a Local Authority to a non-elective office necessary to the proper carrying out of the power and duties imposed upon the Local Authority by the *Local Government Act 1995*, its successor and/or any other Act.

36 Whether an employee is covered by the LGO Award turns on whether the employee is employed in a classification set out in cl 15 of the LGO Award. It is not clear that hospitality employees are so employed. If the LGO Award does cover the employees as described by WALGA, it is unclear what classification would apply to them.

37 WALGA has not established that the LGO Award applies to hospitality staff, such that the Commission can be satisfied that there is another appropriate award that extends to and binds hospitality workers employed by local government authorities. Accordingly, the criteria in s 37D(5) of the Act for reducing the scope of the Award to exclude local government authorities and their employees is not met.

Conclusion and Order

38 The Commission orders that the Award be amended in accordance with the Schedule attached to these reasons, with effect from the date of the Commission's order.

SCHEDULE

1. Delete Clause 3 **Area** and substitute with a new Clause 3 **Area** as follows:

3. - AREA

(1) This Award has effect throughout Western Australia.

(2) This Award has effect with respect to employers who are connected to the State of Western Australia and their employees while performing work covered by this Award.

Note: for a non-exhaustive list of indicators of when an employer may be connected to the State of Western Australia, see s 3(2) of *the Industrial Relations Act 1979*. Indicators include but are not limited to, whether the employer is:

- domiciled or resident in, or has a place of business in, the State; or
- registered, incorporated, or established under a law of the State; or
- the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority.

2. Delete Clause 4 **Scope** and substitute with new a Clause 4 **Scope** as follows:

4. - SCOPE

(1) This Award applies to all employers (including catering employers) in the restaurant and catering industry, as defined in Clause 6. - Definitions of this Award, and their employees employed in the classifications specified in Clause 21. - Wages of this Award.

(2) This Award also applies to:

(a) employers that supply labour on an on-hire basis to host employers in the restaurant and catering industry in respect of on-hire employees employed in the classifications mentioned in this Award, and those on hire employees, while engaged in the performance of work covered by this Award; and

(b) employers that provide group training services for apprentices and/or trainees in the restaurant and catering industry in respect of apprentices and/or trainees working in one or more of the classifications mentioned in this Award, and those apprentices and/or trainees, while engaged by a host employer in the performance of work covered by this Award.

(3) This Award does not apply employers and employees who are covered by the following awards:

(a) Fast Food Outlets Award 1990.

(b) Club Workers' Award.

(c) Hotel and Tavern Workers' Award.

(d) Motel, Hostel, Service Flats and Boarding House Workers' Award.

(e) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977.

(4) This Award does not to employers and employees who are subject to the national industrial relations system.

3. Delete subclauses (1) and (2) of Clause (6) **Definitions** and substitute with new subclauses (1) and (2) as follows:

(1) The restaurant and catering industry means:

(a) any restaurant, café, coffee shop, tearoom, dining or meal room, cafeteria, canteen, takeaway or fast food establishment (excluding those establishments covered by the Fast Food Outlets Award 1990); and

(b) any place, building, stand, stall, tent, vehicle or boat or part of such, in or from which food and/or drinks are sold or served for consumption on the premises, including any establishment or place where food is prepared and/or cooked to be sold or served for consumption elsewhere; and

(c) the provision of catering services where meals and/or light refreshments and/or drinks are served and provided in any building or place for weddings, parties, dances, social functions, theatres, festivals, fairs, exhibition buildings, cultural centres, convention centres, entertainment centres, racecourses, showgrounds, sporting grounds, and the like.

(2) Catering Employer means any employer whose primary business is to provide catering and ancillary services for any social, commercial, industrial or other purpose or function.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2023 WAIRC 00779

ELECTRICAL CONTRACTING INDUSTRY AWARD R 22 OF 1978

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	KELMEC SERVICES AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 29 SEPTEMBER 2023
FILE NO/S	APPL 60 OF 2023
CITATION NO.	2023 WAIRC 00779

Result	Award Varied
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS the Electrical Trades Union WA (**ETU**) applied on 7 August 2023 to vary the *Electrical Contracting Industry **Award** R 22 of 1978* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to:

(a) Increase a number of the allowances in the Award by the percentage increase ordered in the 2023 State Wage case ([2023] WAIRC 00337; (2023) 103 WAIG 748), that is an increase of 5.3%; or by relevant CPI rates from June 2022 to June 2023; and

(b) Update the superannuation provisions of the Award;

AND WHEREAS the Commission sought the ETU's clarification of the 'Phosphate Ships' rate at cl 18(12) and the correct rounding to be applied. The ETU clarified that the correct rate, rounded to the nearest cent should be '$1.05' and not '$1.06';

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

(a) The amendments proposed do not effect 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 Contracting Industry Award R 22 of 1978* be varied in accordance with the following schedule and that the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

SCHEDULE

1. Clause 12. - Overtime: Delete paragraph (e) of subclause (2) of this Clause and insert in lieu thereof the following:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $17.10 for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid for each meal provided and not required, $17.10.

2. Clause 18. - Special Rates and Provisions:

A. Delete subclauses (1), (2), (3), (4) and (5) of this Clause and insert in lieu thereof the following:

(1) Height Money: An employee shall be paid an allowance of $3.45 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.

(2) Dirt Money: An employee shall be paid an allowance of 71 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) Grain Dust: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding $1.19 per hour.

(4) Confined Space: An employee shall be paid an allowance of 84 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.

(5) Diesel Engine Ships: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of $1.19 per hour whilst so engaged.

B. Delete subclause (7) of this Clause and insert in lieu thereof the following:

(7) Hot Work: An employee shall be paid an allowance of 71 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.

C. Delete subclauses (9), (10), (11) and (12) of this Clause and insert in lieu thereof the following:

(9) Percussion Tools: An employee shall be paid an allowance of 46 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) Chemical, Artificial Manure and Cement Works: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of $17.60 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) Abattoirs: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $23.80 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) Phosphate Ships: An employee shall be paid an allowance of $1.05 for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

D. Delete subclause (19) of this Clause and insert in lieu thereof the following:

(19) 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.

E. Delete subclause (21) of this Clause and insert in lieu thereof the following:

(21) Nominee: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of $87.60 per week.

3. Clause 19. - Car Allowance: Delete this Clause and insert in lieu thereof the following:

19. - CAR ALLOWANCE

Where an employee is required and authorised to use their own motor vehicle in the course of their duties the employee shall be paid an allowance of $1.03 per kilometre travelled. Notwithstanding anything contained in this Clause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

4. Clause 20. - Allowance for Travelling and Employment in Construction Work: Delete paragraph (a) of subclause (2) of this Clause and insert in lieu thereof the following:

(a) On jobs measured by radius from the General Post Office, Perth situated within the area of:

		Per Day $
(i)	Up to and including 50 kilometre radius	22.25
	OR	
(ii)	Over 50 kilometres up to and including 60 kilometre radius	28.20
	OR	
(iii)	Over 60 kilometres up to and including 75 kilometre radius	43.40
	OR	
(iv)	Over 75 kilometres up to and including 90 kilometre radius	61.35
	OR	
(v)	Over 90 kilometres up to and including 105 kilometre radius	79.70

5. Clause 21. - Distant Work:

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

(6) An employee to whom the provisions of subclause (1) of this Clause apply shall be paid an allowance of $43.55 for any weekend that they return to their home from the job but only if -

(a) The employee advises the employer or their 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 to 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.

B. Delete subclause (9) of this Clause and insert in lieu thereof the following:

(9) Where an employee, supplied with the board and lodging by their 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 $19.25 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 27. - Grievance Procedure and Special Allowance: Delete subclause (3) of this Clause and insert in lieu thereof the following:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of $43.50 per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as nonadherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and $43.50 shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of $43.50 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

7. Clause 30. - Special Provisions - Western Power Corporation: Delete subclauses (2), (3), (4), (5) and (6) of this Clause and insert in lieu thereof the following:

(2) In addition to the wage otherwise payable to an employee pursuant to the provisions of this award an employee (other than an apprentice) shall be paid:

(a) $2.79 per hour for each hour worked if employed at Muja;

(b) $1.65 per hour for each hour worked if employed at Kwinana;

(3) (a) An employee to whom Clause 20. - Allowance for Travelling and Employment in Construction Work applies and who is engaged on construction work at Muja shall be paid:

(i) An allowance of $22.25 per day if the employee resides within a radius of 50 kilometres from the Muja Power Station;

(ii) An allowance of $60.30 per day if the employee resides outside that radius;

in lieu of the allowance prescribed in the said Clause.

(b) Where transport to and from the job is supplied by the employer from and to a place mutually agreed upon between the employer and the employee half the above rates shall be paid provided that the conveyance used for such transport is equipped with suitable seating and weather proof covering.

(4) In addition to the allowance payable pursuant to subclause (6) of Clause 21. - Distant Work of this award an employee to whom that Clause applies shall be paid $38.10 on each occasion upon which the employee returns home at the weekend but only if -

(a) The employee has completed three months' continuous service with the employer;

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

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

(d) The employer does not provide or offer to provide suitable transport; and such payment shall be deemed to compensate for a periodical return home at the employer's expense.

(5) An employee to whom Clause 21. - Distant Work of this award applied and who proceeds to construction work at Muja from their home where located within a radius of 50 kilometres from the General Post Office, Perth -

(a) Shall be paid an amount of $102.35 and for three hours at ordinary rates in lieu of the expenses and payment prescribed in subclause (3) of the said Clause; and

(b) In lieu of the provisions of subclause (4) of the said Clause, shall be paid $102.35 and for three hours at ordinary rates when their services terminate if the employee has completed three months continuous service;

and the provisions of subclause (3) and subclause (4) of Clause 21. - Distant Work shall not apply to such an employee.

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $701.50 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this award shall not apply.

8. Clause 36. - Superannuation: Delete paragraphs (a) and (b) of subclause (2) of this Clause and insert in lieu thereof the following:

(a) Adult Employees

Each employer shall, on behalf of each full time, part time or casual employee as defined in Clause 5. - Definitions of this Award, pay a weekly contribution into an approved occupational superannuation fund on the following basis:

(i) For employees not engaged on construction work, a weekly contribution of 11% of the employee's weekly earnings.

(ii) Provided that

(aa) An employee who is entitled to be paid a Leading Hand and/or Commissioning Allowance as prescribed in First Schedule - Wages of this Award, shall have an amount calculated as 11% of those allowances added to their weekly contribution.

(bb) An employee who is entitled to be paid shift loadings including weekend and public holiday rates where the shift work is part of the employee's ordinary hours of work, shall have an amount calculated at 11% of such loading added to their weekly contribution.

(iii) Provided further that part time and casual employees will have pro-rata payments made on their behalf.

(b) Apprentices

Each employer shall, on behalf of apprentices, pay a weekly contribution into an approved occupational superannuation fund on the following basis:

(i) For apprentices not engaged on construction work, a weekly contribution calculated as 11% of the rate of pay prescribed in the First Schedule – Wages of this Award as follows:

Four Year Term		**Three and a Half Year Term**		**Three Year Term**	
1st Year	$44.60	Six Months	$44.60		
2nd Year	$58.30	Next Year	$58.30	1st Year	$58.30
3rd Year	$76.60	Next Year	$76.60	2nd Year	$76.60
4th Year	$90.30	Final Year	$90.30	3rd Year	$90.30

(ii) Provided that adult apprentices receive an 11% contribution based on their actual rate of pay.

(iii) Provided further that apprentices engaged on construction work shall, in addition to the contributions provided in (i) hereof, have an amount calculated as 11% of the applicable Construction Allowance as provided in First Schedule – Wages of this Award added to their weekly contribution.

9. First Schedule - Wages:

A. Delete subclause (3) of this Schedule and insert in lieu thereof the following:

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$36.60
(b)	If placed in charge of more than ten but not more than twenty other employees	$56.20
(c)	If placed in charge of more than twenty other employees	$72.70

B. Delete subclauses (5) and (6) of this Schedule and insert in lieu thereof the following:

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. - Special Rates and Provisions of this award the tool allowance to be paid is:

(i) $21.20 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $21.20 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

(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.

(6) Construction Allowance:

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

(i) $65.30 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $58.80 per week if the employee is engaged on 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 the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $34.70 per week if the employee is 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 applies to particular work shall be determined by the Board of Reference.

C. Delete subclauses (9) and (10) of this Clause and insert in lieu thereof the following:

(9) Licence Allowance:

A tradesperson 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 at the date of this award under the Electricity Act, 1945, shall be paid $31.10 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $47.50 per week in addition to rates prescribed in this schedule.

2023 WAIRC 00767

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	MINISTER FOR AGRICULTURE AND OTHERS
	RESPONDENTS
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	TUESDAY, 19 SEPTEMBER 2023
FILE NO/S	APPL 64 OF 2023
CITATION NO.	2023 WAIRC 00767

Result	Award Varied
Representation	(on the papers)
Applicant	Electrical Trades Union WA
Respondents	Department of Health

Order

WHEREAS this is an application filed by the Electrical Trades Union WA (**ETU**) on 14 August 2023 to vary the *Engineering Trades (Government)* ***Award****, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2023 State Wage case ([2023] WAIRC 00337; (2023) 103 WAIG 748), that is an increase of 5.3% and by relevant CPI rates from June 2022 to June 2023;

AND WHEREAS, the Health Service Provider respondents consent to the variations to the Award proposed by the ETU and the variations were not opposed by any other respondent;

AND WHEREAS, at the invitation of the Commission, the ETU and Health Service Provider respondents consent to a further variation to clause 21(1) to remove a definition of "de facto spouse" which is contrary to the *Interpretation Act 1984* (WA) and discriminatory;

AND WHEREAS the parties consented to the application being determined on the papers;

AND BEING satisfied that:

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

(b) The variations are by consent; 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 *Engineering Trades (Government) Award 1967 Award Nos 29, 30 and 31 of 1961 and 3 of 1962* 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 the date of this order.

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

SCHEDULE

1. Clause 14. - Overtime:

A. Delete paragraph (e) of subclause (3) of this Clause and inset in lieu thereof the following:

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $16.00 for a meal 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 $11.30 for each meal so required.

B. Delete paragraph (h) of subclause (3) of this Clause and inset in lieu thereof the following:

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $7.45 for breakfast.

2. Clause 17. - Special Rates and Provisions:

A. Delete subclauses (1), (2), (3), (4) and (5) of this Clause and insert in lieu thereof the following:

(1) Height Money: An employee shall be paid an allowance of $3.45 for each day in 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 in ships or buildings.

(2) Dirt Money: Dirt Money of 72 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 79 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(3) Confined Space:
93 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 47 cents per hour extra whilst so engaged.

(5) Hot Work: An employee shall be paid an allowance of 72 cents per hour while working 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 subclauses (8), (9), (10), (11), (12), (13), (14), (15) and (16) of this Clause and insert in lieu thereof the following:

(8) Any employee working in water over their boots or, if gumboots are supplied, over the gumboots, shall be paid an allowance of $2.25 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 72 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $4.40 for such examination and $1.59 per hour extra thereafter for fixing, renewing or repairing such work.

(11) Ship Repair Work: Any employee engaged in repair work on board ships shall be paid an additional $7.95 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $3.04 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 23 cents per hour, with a minimum payment of $2.05 per day.

(14) Abattoirs -
An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $24.60 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $23.10 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 76 cents per hour, with a minimum payment for four hours.

(16) Morgues -
An employee required to work in a morgue shall be paid 76 cents per hour or part thereof, in addition to the rates prescribed in this clause.

C. Delete subclause (19) of this Clause and insert in lieu thereof the following:

(19) An employee required to repair or maintain incinerators shall be paid $4.70 per unit.

D. Delete subclauses (21), (22), (23), and (24) of this Clause and insert in lieu thereof the following:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 54 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of 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, 1948 shall be paid an allowance of $30.20 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 97 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) Towing Allowance: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $6.85 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26), (27), (28) and (29) of this Clause and insert in lieu thereof the following:

(26) First Aid Allowance: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance employer to perform first aid duties, shall be paid $14.70 per week in addition to their ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $3.04 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $26.20 per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $21.20 per week for work performed in a hospital environment; and

(ii) $7.10 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital
King Edward Memorial Hospital
Sir Charles Gairdner Hospital
Royal Perth Hospital
Fremantle Hospital

(b) $15.50 per week for work performed in a hospital environment at -

Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt. Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) $10.10 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	Port Hedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 19. - Fares and Travelling Allowances: Delete paragraphs (a), (b) and (c) of subclause (1) and insert in lieu thereof the following:

(a) On places within a radius of fifty kilometres from the General Post Office, Perth - $21.45 per day;

(b) For each additional kilometre to a radius of sixty kilometres from the General Post Office, Perth $1.13 per kilometre;

(c) Subject to the provisions of paragraph (d) work performed at places beyond a sixty kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employee with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause in which case an additional allowance of $1.13 per kilometre shall be paid for each kilometre in excess of the sixty kilometre radius.

4. Clause 20. - Distant Work - Construction: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $44.15 and for any weekend that he/she return to his home from the job but only if -

(a) The employer or his/her agent is advised of the intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;
(b) He/she 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.

(7) Where an employee supplied with board and lodging by the employer, is required to live more than eight hundred metres from the job, they shall be provided with suitable transport to and from that job or be paid an allowance of $19.30 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 21. - District Allowances:

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

(1) For the purposes of this clause the following terms shall have the following meaning:
"Dependant" in relation to an employee means:
(a) a spouse; or
(b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;
who does not receive a district or location allowance of any kind.
"Partial Dependant" in relation to an employee means:
(a) a spouse; or
(b) where there is no spouse, a child or any other relative resident within the State who relies on the employee for their main support;
who receives a district or location allowance of any kind less than that applicable to an employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant.
"Spouse" means an employee's spouse or de factor partner.

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

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I	COLUMN II	COLUMN III	COLUMN IV
District	**Standard Rate**	**Exceptions To Standard Rate**	**Rate**
	$ Per Week	**Town Or Place**	**$ Per Week**
6	111.90	Nil	Nil
5	91.50	Fitzroy Crossing	123.30
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	115.00
		Marble Bar	
		Wittenoom	
		Karratha	108.30
		Port Hedland	100.20
4	46.50	Warburton Mission	124.20
		Carnarvon	43.30
3	29.20	Meekatharra	46.50
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	20.90	Kalgoorlie	7.00
		Boulder	
		Ravensthorpe	27.50
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

6. First Schedule - Wages:

A. Delete subclause (5) of this Schedule and insert in lieu thereof the following:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all-purpose industry allowance of $23.80.

(b) This allowance shall be paid in two instalments, as follows:

(i) $11.90 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $11.90 - totalling $23.80 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

B. Delete subclause (8) of this Schedule and insert in lieu thereof the following:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than 10 other employees	38.20
If placed in charge of more than 10 and not more than 20 other employees	58.50
If placed in charge of more than 20 other employees	74.80

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than 10 other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	93.30
Harvey, Dwellingup, Mundaring, Yanchep	46.40
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	23.50
Jarrahdale	23.50

C. Delete subclauses (10), (11), and (12) of this Schedule and insert in lieu thereof the following:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $66.80 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $60.10 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $35.50 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

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

(i) $21.20 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

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

(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 the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $3.51 per hour whilst so engaged.

7. Fifth Schedule - Building Management Authority Wages and Conditions:

A. Delete paragraphs (c), (d) and (e) of subclause (5) of this Schedule and insert in lieu thereof the following:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all-purpose payment of $39.90 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all-purpose allowance of $53.90 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule Wages of this Award.

B. Delete subclause (7) of this Schedule and insert in lieu thereof the following:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $5.70 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2023 WAIRC 00780

GATE, FENCE AND FRAMES MANUFACTURING AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELECTRICAL TRADES UNION WA
	APPLICANT
	-v-
	DBS FENCING AND ANOTHER
	RESPONDENTS
CORAM	SENIOR COMMISSIONER R COSENTINO
DATE	FRIDAY, 29 SEPTEMBER 2023
FILE NO/S	APPL 68 OF 2023
CITATION NO.	2023 WAIRC 00780

Result	Award Varied
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS this is an application filed by the Electrical Trades Union WA (**ETU**) on 21 August 2023 to vary the *Gate, Fence and Frames Manufacturing **Award*** pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to:

(a) Increase the allowances in the Award by the percentage increase ordered in the 2023 State Wage case ([2023] WAIRC 00337; (2023) 103 WAIG 748), that is an increase of 5.3% and by relevant CPI rates from June 2022 to June 2023; and

(b) Increase Fares and Travelling Time allowance in accordance with the *Building and Construction General On-site Award 2010* (MA000020);

AND WHEREAS the ETU amended its application to additionally vary the junior rates of pay provisions to remove provisions which would result in employees being paid less than the statutory minimum rates of pay;

AND WHEREAS the variations were not opposed by any respondent to the application for variation;

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 as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in this application. The adjustments sought are consistent with the wage fixing principles set out in the 2021 State Wage Case;

AND BEING satisfied that 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 *Gate, Fence and Frames Manufacturing 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 the date of this order.

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

SCHEDULE

1. Clause 7. - Overtime: Delete paragraph (f) of subclause (3) of this Clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (h) 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 $15.00 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $10.35 for each meal so required.

2. Clause 14. - Special Rates and Provisions:

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

(1) Dirt Money: An employee shall be paid an allowance of 74 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.

(2) Confined Space: An employee shall be paid an allowance of 93 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

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

(4) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association appointed by the employer to perform first aid duties, shall be paid $15.30 per week in addition to the ordinary rate.

3. Clause 19. - Fares and Travelling Time: Delete paragraphs (a), (b) and (c) of subclause (2) of this Clause and insert in lieu thereof the following:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $21.20 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth - 95 cents per kilometre.

(c) Subject to the provisions of paragraph (d), of this subclause work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees with the consent of the Union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 95 cents per kilometre shall be paid for each kilometre in excess of 60 kilometres.

4. Clause 20. - Distant Work: Delete subclauses (6) and (7) of this Clause and insert in lieu thereof the following:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $40.35 for any week-end the employee returns to the employee's home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention not later than the Tuesday immediately preceding the week-end in which the employee so returns;

(b) The employee is not required for work during that week-end;

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

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

(7) 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 $17.75 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates, whether or not suitable transport is supplied by the employer.

5. First Schedule - Wages:

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

(2) Leading Hand: In addition to the appropriate rate 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 twenty other employees	39.80

(b) If placed in charge of more than ten and not more than twenty other employees 61.10
(c) If placed in charge of more than twenty other employees 78.80

B. Delete paragraph (a) of subclause (4) of this Schedule and insert in lieu thereof the following:

(4) Junior Employees:

(a) (Wages per week expressed as a percentage of the "Process Employees" rate).

	%
Under 16 years of age	40
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age	93

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

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

(i) $22.20 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $22.20 being the percentage which appears against the year of apprenticeship in subclause (a) of subclause (3) of this Schedule.

For the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson 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 schedule.

(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.

2023 WAIRC 00761

PUBLIC TRANSPORT AUTHORITY (TRANSWA) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 19 SEPTEMBER 2023
FILE NO/S	APPL 55 OF 2023
CITATION NO.	2023 WAIRC 00761

Result	Award Varied
Representation	
Applicant	Ms J Allen-Rana for the Public Transport Authority of Western Australia
Respondent	Mr J Dekuyer for the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia on 25 July 2023 to vary the *Public Transport Authority (Transwa) Award 2006* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the parties have requested that this agreement be registered on the papers;

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 powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the *Public Transport Authority (Transwa) Award 2006* be varied in accordance with the attached Schedule.

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

SCHEDULE

1. Clause 5.1 – Shift Work:

A. Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:

5.1.1 On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $3.29 an hour on all time paid at ordinary rate.

B. Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On a night shift, which commences at or between 1800 and 0359 hours, an employee will be paid an allowance of $3.79 an hour on all time paid at ordinary rate.

C. Delete subclause 5.1.3 of this clause and insert the following in lieu thereof:

5.1.3 On an early morning shift, which commences at or between 0400 and 0530, an employee will be paid an allowance of $3.29 an hour on all time paid at ordinary rate.

D. Delete subclause 5.1.4 of this clause and insert the following in lieu thereof:

5.1.4 In addition to the hourly shift work allowance, an employee will be paid an allowance of $3.79 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

2. Clause 5.2 – Temporary Transfer Allowance:

A. Delete subclause 5.2.1 paragraph (a) of this clause and insert the following in lieu thereof:

5.2.1 When an employee in the metropolitan area is required to work at another metropolitan depot other than the depot at which the employee is stationed the following shall apply:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from his usual place of residence to the employee's home depot, the employee shall be paid an allowance of $2.04 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled, and in addition:

B. Delete subclause 5.2.1 paragraph (b) of this clause and insert the following in lieu thereof:

(b) When the period of relief is for one week or less the allowance of $9.05 per shift shall be paid in recognition of the disruption to the employee's normal roster.

3. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 and insert the following in lieu thereof:

5.3.1 Employees directed by the employer to be on call outside the ordinary hours of duty will be paid an allowance of $5.45 per hour for all time on call.

That allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

4. Clause 5.5 – Away from Home and Meal Allowance: Delete subclause 5.5.2 and insert the following in lieu thereof:

5.5.2 Railcar Drivers, Coordinator and Road Coach Operators will be paid an allowance to reimburse the costs of meals and incidentals when on roster and required to stay overnight away from home. This allowance will be calculated on the time between booking on and booking off from the home depot at the rate of $36.00 for each 8 hour period and, where less than 8 hours is worked, at the rate of $8.95 for each 2 hour period or part thereof worked.

2023 WAIRC 00762

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIA BRANCH
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 19 SEPTEMBER 2023
FILE NO/S	APPL 56 OF 2023
CITATION NO.	2023 WAIRC 00762

Result	Award varied
Representation	
Applicant	Ms J Allen-Rana for the Public Transport Authority of Western Australia
Respondent	Mr J Dekuyer for The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia on 24 July 2023 to vary the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the parties have requested that this agreement be registered on the papers;

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 powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the attached Schedule.

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

SCHEDULE

1. Clause 3.3 – Meal and Rest Breaks: Delete paragraph (b) of subclause 3.3.2 of this clause and insert the following in lieu thereof:

3.3.2 (b) The employer shall provide such employee a meal allowance of $15.10 to cover the cost associated with the purchase of foods associated with the taking of a second crib.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

2. Clause 4.3 – Suburban Electric Railcar Allowance: Delete paragraph (a)(1), (2) and (3) of subclause 4.3.1 of this clause and insert the following in lieu thereof:

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$49.20
(2)	Thereafter	$49.60
(3)	Special Case	$50.40

3. Clause 5.1 – Shift Work: Delete paragraphs (a), (b), (c) and (d) of subclause 5.1.1 of this clause and insert the following in lieu thereof:

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $3.38 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $3.92 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $3.38 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $3.92 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

4. Clause 5.2 – Temporary Transfer Allowance: Delete paragraphs (a) and (b) of subclause 5.2.1 of this clause and insert the following in lieu thereof:

(a) When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee's home depot, the employee shall be paid an allowance of $2.04 per kilometre in both directions for the extra distance the employee is required to travel. Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled.

The rates referred to in this subclause shall be adjusted by the Employer from time to time by reference to changes to the median of the Perth metropolitan Tariff 1 weekday pay rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.

(b) When the period of relief is for one week or less the allowance of $9.05 per shift shall be paid in recognition of the disruption to the employee's normal roster.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

5. Clause 5.3 – On Call Allowance: Delete subclause 5.3.1 of this clause and insert the following in lieu thereof:

5.3.1 Employees on call outside the ordinary hours of duty will be paid an allowance of $5.02 per hour for all time on call.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2023 WAIRC 00778

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	FRIDAY, 29 SEPTEMBER 2023
FILE NO/S	APPL 65 OF 2023
CITATION NO.	2023 WAIRC 00778

Result	Award Varied
Representation	
Applicant	No appearance
Respondents	No appearance

Order

WHEREAS this is an application filed by the Electrical Trades Union WA (**ETU**) on 16 August 2023 to vary the *Radio and Television Employees' **Award*** pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule C of the application set out the grounds upon which it is made, indicating the application is made to increase the allowances in the Award by the percentage increase ordered in the 2023 State Wage case ([2023] WAIRC 00337; (2023) 103 WAIG 748), that is an increase of 5.3% and by relevant CPI rates from June 2022 to June 2023;

AND WHEREAS the ETU amended its application to additionally vary the junior rates of pay provisions to remove provisions which would result in employees being paid less than the statutory minimum rates of pay and delete the text of clause 31;

AND WHEREAS the variations were not opposed by any respondent to the application for variation;

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 as the application is not made within the term specified in clause 4 of the Award, s 40(3) of the IR Act is inapplicable and no barrier to the amendments sought;

AND WHEREAS the Award does not specify a method for adjusting allowances which is at odds with the methods involved in this application. The adjustments sought are consistent with the wage fixing principles set out in the 2021 State Wage Case;

AND BEING satisfied that 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 *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 the date of this order.

(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 $16.35 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 $11.05 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)**		
Rate per Kilometre (cents)	**Over 2600cc**	**1600cc - 2600cc**	**1600cc & Under**
Metropolitan Area	101.6	90.7	79.0
South West Land Division	103.9	93.0	80.8
North of 23.5º South Latitude	114.1	102.3	89.3
Rest of the State	107.1	96.0	83.8
MOTOR CYCLE (In All Areas)	34.8 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 $19.00 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 $39.00
(b) If placed in charge of more than ten but not more than twenty other employees $59.40
(c) If placed in charge of more than twenty other employees $76.80

B. Delete subclause (4) of this Clause and insert in lieu thereof:

(4) Junior Employees -

(Wage per week expressed as a percentage of the "Assembler" rate as shown in subclause (1) of this clause).

	%
Under 16 years of age	40
Between 16 and 17 years of age	50
Between 17 and 18 years of age	60
Between 18 and 19 years of age	70
Between 19 and 20 years of age	80
Between 20 and 21 years of age	90

C. 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) $21.40 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $21.40 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.

5. Clause 31. – Junior Employees - Special Orders: Delete the text of this Clause and re-name it:

31. - JUNIOR EMPLOYEES - SPECIAL ORDERS – CANCELLED

2023 WAIRC 00763

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA **APPLICANT** **-v-** AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIA BRANCH; THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING & KINDRED INDUSTRIES UNION OF WORKERS WESTERN AUSTRALIAN BRANCH; ELECTRICAL TRADES UNION OF WA **RESPONDENT**
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 19 SEPTEMBER 2023
FILE NO/S	APPL 57 OF 2023
CITATION NO.	2023 WAIRC 00763

Result	Award Varied
Representation	
Applicant	Ms J Allen-Rana for the Public Transport Authority of Western Australia
Respondents	Mr J Dekuyer for The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch Mr Peter Carter for the Electrical Trades Union of WA Mr G Carozzi for The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers Western Australian Branch

Order

WHEREAS this is an application filed by the Public Transport Authority of Western Australia on 24 July 2023 to vary the *Railway Employees' Award No. 18 of 1969* (Award) pursuant to s 40 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the parties have requested that this agreement be registered on the papers;

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 powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the *Railway Employees' Award No. 18 of 1969* be varied in accordance with the attached Schedule.

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

SCHEDULE

1. Clause 4.3 – Experience Allowance: Delete this clause and insert the following in lieu thereof:

Employees classified at levels 4 to 7 inclusive shall be paid the following allowance as part of the ordinary base rate of pay for all purposes

After 12 months service with the employer - $ 7.80

After 24 months service with the employer - $ 16.30

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

2. Clause 4.4 – Tool Allowance: Delete paragraph (a) of subclause 4.4.1 of this clause and insert the following in lieu thereof:

(a) Where the employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that trades person or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of $19.80 per week to such tradesperson/apprentice.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

3. Clause 4.5 – Leading Hands:

A. Delete paragraph (a) of this clause and insert the following in lieu thereof:

(a) Class 3

When in charge of not less than three and not more than ten others, paid $37.00 extra per week

B. Delete paragraph (b) of this clause and insert the following in lieu thereof:

(b) Class 2

When in charge of more than 10 but fewer than twenty others, paid $55.40 extra per week

C. Delete paragraph (c) of this clause and insert the following in lieu thereof:

(c) Class 1

When in charge of more than twenty others, paid $71.60 extra per week

4. Clause 4.6 – Electrical Licence Allowance: Delete this clause and insert the following in lieu thereof:

An electronics tradesperson, an electrical fitter and/or armature winder or an electrical installer who holds and in the course of his or her employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force in the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $26.20 per week.

5. Clause 5.1 – On Call Allowance: Delete subclause 5.1.2 of this clause and insert the following in lieu thereof:

5.1.2 On Call Allowance

An employee who is directed by the Head of Branch or other duly authorized officer to be available on call outside the ordinary hours of duty as prescribed in Part 3 of this Award, shall be paid an On Call allowance of $5.46 per hour.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

6. Clause 5.3 – Meal Breaks: Delete paragraph (a) of subclause 5.1.3 of this clause and insert the following in lieu thereof:

53.1 Meal Breaks

(a) An employee who having responded to a call is unable to return to the employee's home during a recognized meal period for a meal shall be supplied with a meal or be paid a meal allowance of $13.10 as provided under this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

7. Clause 5.4 – Away from Home Allowances:

A. Delete subclause 5.4.2 of this clause and insert the following in lieu thereof:

5.4.2 Where subclause 5.4.1. applies, the employee shall be paid an allowance of $59.40 per day except when the accommodation includes dining facilities and meals, in which case an allowance of $44.60 per day shall be paid.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

B. Delete subclause 5.4.5 of this clause and insert the following in lieu thereof:

5.4.5 When an employee is required by the employer to attend a training course, seminar or other such meeting which involve an overnight stay away from the employee's home or lodging, the employee, at the discretion of the employer, may be provided with accommodation and meals and if so provided shall be paid an incidental allowance of $15.65 per day.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

8. Clause 5.6 – Travelling Time - Traffic:

A. Delete subclause 5.6.2 of this clause and insert the following in lieu thereof:

5.6.2 When the distance the employee is required to travel from the employee's usual place of residence to the depot where the employee is temporarily working is greater than the distance the employee is required to travel from the usual place of residence to the employee's home depot, the employee shall be paid an allowance of $2.04 per kilometre in both directions for the extra distance the employee is required to travel.

Such allowance as specified in this paragraph is in recognition of the cost and time taken for the extra distance to be travelled. The rates referred to in this subclause will be adjusted by the Employer from time to time by reference to changes in the median of the Perth metropolitan Tariff 1 weekday rates per kilometre charged by all licensed taxis in Perth. The adjustment shall take effect from the date nominated by the Employer, which shall be no later than 28 days after being notified in writing by the Union of a change to the median weekly rate.

B. Delete subclause 5.6.3 of this clause and insert the following in lieu thereof:

5.6.3 When the period of relief is for one week or less an allowance of $9.05 per shift shall be paid in recognition of the disruption to the employee's normal roster. This allowance is in addition to that provided in sub clause 5.6.2.

The above allowance will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502).

9. Clause 5.7 – Meal Allowance:

A. Delete subclause 5.7.1 of this clause and insert the following in lieu thereof:

5.7.1 Refreshment Allowance

An employee employed in the actual running of trains whose shift is extended by more than two hours and the total duration of the shift exceeds ten hours, shall be paid a refreshment allowance of $6.60 where:

(a) Notification of the requirement to work an extended shift was not given prior to the finish of the preceding shift; and

(b) The employee is not entitled to a meal allowance as prescribed elsewhere in this Award.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

B. Delete subclause 5.7.2 of this clause and insert the following in lieu thereof:

5.7.2 Meal Allowance

Where an employee is required to work beyond ordinary rostered hours without being notified on the previous day, the employee shall be provided with a meal or be paid $13.10 in lieu where:

(a) The employee is in an Other Than Traffic position, and is required to so work for more than 1 hour, or until after 1800 hours; or

(b) The employee is in a Traffic classification, and the rostered hours of duty have been extended by more than one hour beyond the recognised meal period.

The above allowance will be adjusted in accordance with the official movements in the Consumer Price Index (CPI) - Food (Perth) as measured for the preceding 12 months at the end of the March quarter by the Australian Bureau of Statistics.

10. Clause 5.8 – Shifts and/or Night Work Allowance – (Six-Day Shift Work): Delete paragraphs (a), (b), (c), (d) and (e) of subclause 5.8.1 of this clause and insert the following in lieu thereof:

5.8.1 The employer may, if the employer so desires, work any part of the establishment on shift work as part of the 38 ordinary hours per week, Monday to Saturday. The employer shall consult affected employees beforehand, and notify the Union of the intention to introduce shift work. The employer shall post the shift work roster at least 14 days in advance of the start date.

(a) On an afternoon shift, which commences before 1800 hrs and the ordinary time of which concludes at or after 1830 hours will be paid an allowance of $3.29 an hour on all time paid at the ordinary rate.

(b) On a night shift, which commences at or between 1800 hours and 0359 hours, will be paid an allowance of $3.79 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or between 0400 hours and 0530 hours, will be paid an allowance of $3.29 an hour for all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance an employee will be paid an allowance of $3.79 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) The provisions of subparagraphs (a) to (d) of this clause will not apply to employee's continuously on shifts, which start and finish between 1800 and 0600 hours. These employees will be paid night work allowance for ordinary paid time on duty between those hours at the rate of $3.92 per hour.

The above allowances will be adjusted by a percentage derived from the State Wage General Order as amended or superseded, applied to the key classification rate of REA4 of the Railway Employees Award No 18 of 1969, using the procedure stated in ROUNDING OF ALLOWANCES (87 WAIG 1502)

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2023 WAIRC 00773

INTERPRETATION OF CLAUSE 80 OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2023 WAIRC 00773
CORAM	**:**	COMMISSIONER T EMMANUEL
HEARD	**:**	TUESDAY, 25 JULY 2023
DELIVERED	**:**	FRIDAY, 22 SEPTEMBER 2023
FILE NO.	**:**	APPL 18 OF 2021
BETWEEN	**:**	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS Applicant AND MINISTER FOR CORRECTIVE SERVICES RESPONDENT Respondent

CatchWords	**:**	Interpretation of industrial agreement – s 46 *Industrial Relations Act 1979* (WA) – The *Department of Justice Prison Officers' Industrial Agreement 2020* – cl 80 – annual leave – principles that apply to interpretation of agreements
Legislation	**:**	*Industrial Relations Act 1979* (WA): s 46(1)(a) *Minimum Conditions of Employment Act 1993* (WA): s 5, s 8, s 25
Result	**:**	Declaration issued
Representation:		
Counsel:		
Applicant	**:**	Mr C Fordham (of counsel)
Respondent	**:**	Mr R Andretich (of counsel)

Case(s) referred to in reasons:

(Commission's own motion) v Dardanup Butchering Co [2004] WAIRC 2739; (2004) 84 WAIG 2739

Re Harrison; Ex parte Hames [2015] WASC 247

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2020] WAIRC 00430; (2020) 100 WAIG 1174

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2023] WAIRC 00016; (2023) 103 WAIG 93

Reasons for Decision

1 This is an application by the Western Australian Prison Officers' Union of Workers (**Union**) for interpretation and a declaration under s 46(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* (**Industrial Agreement**).

2 Clause 80 of the Industrial Agreement deals with 'annual leave rosters'. Annual leave rosters follow a specified structure but are developed and managed by the local Superintendent.

3 Clause 80 says that it 'shall apply to all Officers who will be divided into groups'. It explains that annual leave rosters operate on either 6 or 8 year cycles, with each year being divided into 6 or 8 week periods. These periods are assigned a letter, for example A, B, C and so on. When a prison officer begins employment at a prison, 'an Officer's position on the leave roster will be confirmed in writing in an Annual Leave Letter'. Clause 80.5 allows a prison officer, who has 'special reasons for doing so', to apply to take annual leave at a time other than as set out in the annual leave roster.

4 The parties disagree about whether a prison officer is required to take annual leave during the period that prison officer is assigned on the annual leave roster.

5 The Union argues that the effect of cl 80 is that a prison officer has three options in relation to annual leave: take annual leave in accordance with that prison officer's position on the annual leave roster, apply to take annual leave at a time other than as set out in the annual leave roster or choose not to take annual leave during that prison officer's rostered period.

6 The Minister argues that cl 80 is intended to require prison officers to take annual leave that they accrue in any leave year at the time allocated to them in the annual leave roster.

Question to be decided

7 The Union asks the Commission to decide 'whether the true meaning of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual

leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.'

8 At the hearing the Union confirmed that it no longer pressed the second question in its application, which related to whether cl 80 prescribes a condition for the use of annual leave that is less favourable than those under the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**).

Background

9 The parties did not call any witnesses. They filed a bundle of agreed documents and the following statement of agreed facts:

1. The Applicant and the Respondent are both parties to the *Department of Justice Prison Officers' Industrial Agreement 2020* (**Agreement**).
2. Amongst other things, the Agreement provides the terms and conditions applicable in respect of annual leave for officers (**officers**) who are employed by the Respondent in any of the positions listed in the Agreement at Schedule A.
3. Under clause 80.1 of the Agreement, each prison operated by the Respondent is to prepare an annual leave roster that is derived from one of the two examples that are listed within that sub-clause, namely –
   a. The 'Eight Year Cycle' roster (eight-year cycle roster); or
   b. The 'Six Year Cycle' roster (six-year cycle roster).
4. The eight-year cycle roster applies to officers who ordinarily work at a prison that is located south of 26 degrees south latitude.
5. The six-year cycle roster applies to officers who ordinarily work at a prison that is located north of 26 degrees south latitude.
6. Under clause 80.1 of the Agreement, the six-year cycle roster and the eight-year cycle roster provide that –
   a. Officers on commencement are to be assigned by an Annual Leave Letter into a group (groups are numbered A to H in the case of an eight-year roster, and groups are numbered A to F in the case of a six-year roster);
   b. Officers within each group have according to their Annual Leave Letter a specific period in the roster within which to take annual leave, which period(s) are to commence at set intervals during the leave year;
   c. In the case of a six-year roster, the duration between the commencement of each interval is 8 weeks. In the case of an eight-year cycle roster the duration between the commencement of each interval is 6 weeks.
7. The eight-year cycle roster referred to in clause 80.1 of the Agreement provides a pattern that is repeated every 8 years. An example of the full cycle of the eight-year cycle roster is illustrated in the table below –

Leave interval periods	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9
July	E	B	A	C	D	G	H	F	E
	F	A	B	D	C	H	G	E	F
	B	E	C	A	G	D	F	H	B
	A	F	D	B	H	C	E	G	A
Christmas	H	C	E	G	A	F	D	B	H
	G	D	F	H	B	E	C	A	G
	C	H	G	E	F	A	B	D	C
June	D	G	H	F	E	B	A	C	D

8. The six-year cycle roster referred to in clause 80.1 of the Agreement provides a pattern that is repeated every 6 years. An example of the full cycle of the six-year cycle roster is illustrated in the table below –

Leave interval periods	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
July	B	C	D	F	A	E	B
	C	B	F	D	E	A	C
	E	D	C	A	F	B	E
Christmas	A	F	B	E	D	C	A
	D	E	A	C	B	F	D
June	F	A	E	B	C	D	F

9. The practical effect of the eight-year cycle roster pattern is that officers may be assigned yearly leave intervals that commence between 40 to 64 weeks apart, depending on the position on the roster cycle.
10. The practical effect of the six-year cycle roster pattern is that officers may be assigned yearly leave intervals that commence between 36 and 68 weeks apart, depending on the position on the roster cycle.

11. The effect of the current policy position of the Respondent is that, subject to the other provisions of the Agreement, an officer is required to take his or her full yearly entitlement of annual leave as rostered.

12. The Respondent's policy position contemplates that an officer who is required to take leave strictly in accordance with his or her leave roster may fall into negative leave balance.

10 At the hearing, the Union agreed not to press its application for leave to lead additional evidence in circumstances where the parties agree that there is a practice of prison officers being expected to apply for annual leave. The Union says this is a neutral fact and does not ask the Commission to make anything of it.

11 At the hearing, counsel for the Union said: 'the applicant doesn't dispute the general proposition that the framework in clause 80 provides restriction on taking leave outside that framework. What's in dispute is whether an employee is required to take his or her full yearly allotment.'

Industrial Agreement provisions

12 Clause 80 of the Industrial Agreement provides:

80. Annual Leave Roster

80.1 The following annual leave rosters shall apply to all Officers who will be divided into groups. The actual annual leave dates may vary from Prison to Prison.

Southern Prisons (Eight Year Cycle)

	2019/20	2020/21	2021/22
July	E	B	A
	F	A	B
	B	E	C
	A	F	D
Christmas	H	C	E
	G	D	F
	C	H	G
June	D	G	H

Northern Prisons (Six Year Cycle)

	2019/20	2020/21	2021/22
July	B	C	D
	C	B	F
	E	D	C
Christmas	A	F	B
	D	E	A
June	F	A	E

80.2 The leave roster shall commence on a date each Leave Year agreed between the parties and shall continue in the order shown for the Leave Year with each group commencing at six or eight week intervals. An Officer who commences employment subsequent to the introduction of the leave roster shall be allocated to a group and shall have the option of taking the balance of the year's annual leave in advance in addition to taking their annual leave already accrued.

80.3 Annual leave rosters to be developed and managed by the local Superintendent, subject to the annual block sequence and principles in this Agreement being followed.

80.4 An Officer's position on the leave roster will be confirmed in writing in an Annual Leave Letter on commencement at a Prison.

80.5 An Officer who has special reasons for doing so may apply to the Employer in writing, to take annual leave at a time other than as set out in the leave roster. If the application is approved a new date for the commencement of the annual leave must be agreed in writing at the time the application is made. If the application is approved the Officer will be deemed to have taken the leave in accordance with the leaveroster.

80.6 The non-leave period will be made up of three weeks and six weeks in any order over a three yearperiod.

13 Clause 81 of the Industrial Agreement provides:

81. Annual Leave Letter Procedures for Transfers and Promotions

81.1 An Officer who is Transferred or promoted to another Prison shall be allocated a new Annual Leave Letter where there is an irresolvable conflict between that Prison's established leave roster and the Officer's original Annual Leave Letter, provided that:

(a) the Officer was notified of the conflict before the Transfer or promotion; and

(b) the Employer, before issuing the new Annual Leave Letter, takes into consideration travel bookings, travel deposits paid and any other circumstances which makes it imperative for the Officer to take their annual leave at the time prescribed by their original Annual Leave Letter.

81.2 The allocation of a new Annual Leave Letter that places an Officer with an immediate second annual leave period in the same Leave Year is to be avoided.

14 The Industrial Agreement defines Annual Leave Letter and Leave Year:

> **Annual Leave Letter** means the letter issued by the Employer to an Officer in accordance with clause 80 - Annual Leave Roster and clause 81 - Annual Leave Letter Procedures for Transfers and Promotions.
>
> **Leave Year** means 1 July to 30 June.

The Union's submissions

15 In essence, the Union says that cl 80 of the Industrial Agreement provides a framework by which the Minister can assign discrete blocks of time each year within which an employee may *agree* to go on annual leave, but cl 80 does not require an employee to go on annual leave.

16 The Union says that the rostering provisions are critical to understanding how annual leave provisions work under the Industrial Agreement. This includes rostering of hours, which impacts on how leave intervals are managed by a prison.

17 The Union made detailed oral submissions about the effect of rostering provisions, including cl 7, 27, 31, 32 and 79. Depending on a prison officer's shift pattern and work location, she will be entitled to between 5 and 7 weeks' annual leave each year, with up to an extra five days of travel leave under cl 85 to be taken when annual leave is taken, if certain travel arrangements are made.

18 The Union says not every prison officer will use 'leave that extends for the full period of the interval of a leave roster'. Further, cl 82 allows a prison officer to take up to five days as individual days of annual leave. The Union says this means:

> [A] person may have, depending on where they're stationed and what type of roster they're working, they may have between five or maybe less than five, if they've used five days of annual leave. They may have as low as four weeks of annual leave and as much as five at the time that they take leave, and that will depend on whether they're a Monday to Friday worker, whether they're located remotely or not, whether they've taken single days of annual leave and if they qualify for travel time.

19 In relation to cl 80.6, the Union says it is significant that 'non-leave period' is not defined. The Union argues that 'non-leave period' refers to the period in an interval when annual leave is not taken. This means that the Industrial Agreement clearly contemplates that some employees will not take annual leave. Clause 9(1)(g) of the Industrial Agreement provides: 'Every officer will be treated fairly and equitably in an environment that fosters communication, involvement and teamwork.' The Union says that cl 9(1)(g) means that it is up to the employee to decide whether to take annual leave. Counsel for the Union stated:

> So clause 9.1G says that everyone's to be treated fairly and equitably. And so what we – the importance of that for this particular clause is to say that it can't be contemplated by the agreement that the employer will decide who is going to take their full complement of leave and who isn't, and how that fits in within the non-leave period. Because you will have – inevitably, you will have some employees who have a full six week allotment available to them. Some may have five weeks. Even though they're a shift worker, they may have used five repay days. Some may have five days – five weeks and three days. There has to be some system that works it out equitably, and it can't be the case that the employer is to simply decide for everybody. There has to be a uniform approach. And the uniform approach has to be that the employees decide for themselves how much leave they will take within the confines of the agreement and keeping that non-leave period suitable enough so it works in with the rostering arrangements.

20 The parties agree that prison officers take annual leave in advance. The Union submits that:

> [I]n reality, what is occurring is that a person is being told to go on paid leave, not being annual leave, and that there is then a debt recorded against that person. And that's referred – the debt is referred to in clause 79.7. And the debt is equivalent to annual leave, but in a negative context, in this context of taking leave in advance, it leaves a person with a negative leave balance, meaning that they've got a negative debt equivalent to a certain number of hours of annual leave.

However, the Union says 'in reality, taking leave in advance, we say, cannot happen', because annual leave accrues incrementally over weeks, so it is not possible to take an entitlement which does not yet exist. Further, the Union says that the MCE Act prevents an employer from requiring an employee to forgo annual leave that has yet to occur.

21 The Union says the provisions of the Industrial Agreement 'should be construed in a way that makes them lawful'. The Union argues that there is 'no problem' with prison officers taking leave in advance when they start at a new prison and paying that leave back later. But the employer cannot require prison officers to take leave in advance every year. To do so would be contrary to the MCE Act, which the Union says weighs against the Minister's construction.

22 The Union also argues that the timing of the Annual Leave Letter weighs against the Minister's construction. In oral submissions, counsel for the Union argued that although the Industrial Agreement does not say this, it is sensible to interpret the Industrial Agreement to mean that an Annual Leave Letter is given every single year, to confirm when a prison officer

takes annual leave that year. The Union says the description 'annual' in relation to Annual Leave Letter suggests that the Annual Leave Letter will be given annually.

23 The Union says that because it cannot be known in advance how much annual leave a prison officer will have, for example if they change from being a 'Prison Officer (Mon – Fri)' to being a 'Prison Officer (Shifts)', then the Industrial Agreement cannot contemplate that the prison officer will take an unknown amount of annual leave. This is because the annual leave must fit in with cl 80.6 of the Industrial Agreement. The non-leave period must be in 3 or 6 week blocks. That cannot be planned in advance if it is not known in advance.

24 In oral submissions in reply, counsel for the Union appeared to concede that a plain reading of the Industrial Agreement does not lead to the conclusion that the Annual Leave Letter will be given annually. He said when an Annual Leave Letter is given, it cannot be known how much annual leave a person will have at the time the leave letter 'falls due', because of cl 82 and cl 85. The Industrial Agreement contemplates that someone must decide the non-leave period under cl 80.6 and the Union says that person must be the prison officer. The Union submits that cl 80.6 is an instruction to employees to formulate their applications for leave so that they do not interfere with the averaging that applies to shift workers.

25 The Union says there is nothing in the Industrial Agreement that says either way whether a person will take all, none or some of their annual leave, but some of the provisions of the Industrial Agreement contemplate that not all leave will be taken, for example the provisions in relation to purchased leave.

26 The Union relies on the principles and approach to interpretation set out in *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* [2020] WAIRC 00430; (2020) 100 WAIG 1174 at [5] and *Re Harrison; Ex parte Hames* [2015] WASC 247 at [50] – [51] and argues that the Commission should ascertain the objective intention as expressed by the terms of the Industrial Agreement considered as a whole, in a way what makes the various parts of the agreement harmonious, and if possible, such that each has some work to do.

27 The Union argues that the purpose of cl 80 is to 'set out the arrangements for the allocation and approval of dates for individual officers to use their accrued annual leave entitlements.'

28 The Union says under cl 80.3 and cl 80.5, the Minister has management authority to agree to a request to depart from the roster where additional absences may be tolerated. Further, cl 80.2 and cl 80.5 suggest that there is minimal employer discretion in the formulation of leave arrangements, and 'that the need for the Employer to individually examine leave arrangements is generally only enlivened where a prison officer wishes to take a specific period of leave at a time that falls outside the allocated roster interval.' The Union argues that there is an objective intention to provide an equitable distribution of leave across the workplace, as shown by the relatively fixed roster cycle.

29 The Union submits that where a prison officer cannot convince the employer that there should be a change to the roster because of special circumstances, and if the prison officer does not want to take annual leave during the period of her Annual Leave Letter, then the only remaining option for the prison officer is simply not to take accrued annual leave at all during a Leave Year.

30 Critically, the Union argues cl 80 shows that an employee has exclusive discretion to decide not to use accrued annual leave, because:

a. cl 80 does not limit the accumulation of annual leave from year to year;

b. cl 80 does not contain express words setting out when and in what circumstances the employer can direct a prison officer to start a period of accrued annual leave in accordance with the annual leave roster, or not in accordance with the roster;

c. cl 80 does not provide any guidance or process by which a prison officer can apply to *not use* her accrued annual leave (original emphasis); and

d. cl 80.6 provides guidance about how a prison officer can chose to not use her accrued annual leave for each contemplated year of the Industrial Agreement term.

31 The Union argues that the objective intention of cl 80 does not require or imply that the employer 'has an additional discretionary power to compel officers' to take their annual leave at the times allocated by the Annual Leave Letter. Rather, the Union says the annual leave roster system is simply concerned with the mechanics of evenly distributing annual leave for a large number of employees, and there is nothing in cl 80 to suggest that the annual leave roster system is concerned with the management of a prison officer's annual leave balance that may accumulate from year to year.

32 The Union made a number of submissions in relation to harmony with surrounding clauses and with other clauses in the Industrial Agreement. In effect the Union submits that there are no other provisions within the Industrial Agreement dealing with annual leave that suggest the employer can compel a prison officer to take annual leave or restrict the accumulation of a balance of accrued annual leave. Further, the Union points to the clause of the Industrial Agreement that deals with long service leave and says that the Industrial Agreement provides that a prison officer makes an application to take long service leave. If the application is refused, the prison officer and employer confer for up to four weeks. If they do not agree, the employer can direct the prison officer under cl 119.1 to take an amount of accrued long service leave from a date the employer choses.

33 The Union says cl 120.1, which relates to the duration of long service leave, indicates that leave is generally intended to be taken by agreement between the prison officer and the employer. The Union argues that the terms of the Industrial Agreement do not indicate that the employer's power to direct a prison officer to take long service leave is intended to manage a prison officer's accumulated leave.

34 The Union also points to cl 138 of the Industrial Agreement which is about purchased leave. The Union says this type of leave is distinguished from other types of leave in the Industrial Agreement, because the clause shows an intention to consider or manage a prison officer's total leave balance.

35 Accordingly, the Union says cl 119 and cl 138 support the following:

a. generally discretionary types of leave like annual leave are to be taken by agreement between the employer and the prison officer;

b. where arrangements for the use of a discretionary type of leave cannot be made by agreement, then a prison officer can decide whether to use the leave at all;

c. the Industrial Agreement contains very few provisions that are designed to limit or empower the employer to manage a prison officer's accumulated leave balance;

d. it is exceptional, rather than the norm, that the employer be able to compel a prison officer to take a period of leave, and is a power only to be used for a specific purpose; and

e. where the employer has a power under the Industrial Agreement to compel a prison officer to take a period of leave, the Industrial Agreement 'will spell out that power in clear terms'.

36 The Union says the answer to the question is 'No' and the true interpretation of cl 80 is that it does not require a prison officer to use annual leave merely because he or she has been allocated a position on the annual leave roster.

The Minister's submissions

37 The Minister says if a prison officer can decide not to take her annual leave in the Leave Year, then that prison officer will never be subject to her Annual Leave Letter, because under s 25(2) of the MCE Act the prison officer can just keep taking accrued annual leave by giving two weeks' notice.

38 The Minister argues that the Commission must consider the industrial context, which is highly regulated, dangerous and staff-dependant. Prisons require minimum staffing levels to function. Without that, prisons go into lockdown, which affects the safety of prisoners and staff.

39 The Minister says this must mean that the Union's position cannot be right. The Industrial Agreement cannot intend that prison officers can choose not to take annual leave in any particular Leave Year, and therefore be able to carry forward their annual leave balances to use at their discretion.

40 The Minister denies there is anything in the Industrial Agreement that suggests an Annual Leave Letter issues annually. Rather, a prison officer only gets a new Annual Leave Letter when a conflict arises, for example when a prison officer transfers to work at a different prison.

41 The Minister says the Industrial Agreement anticipates and permits annual leave being taken before it accrues (cl 79.7). The Minister denies that the Annual Leave Letter system creates a debt. He says in effect there is simply a mechanism of ensuring that where people do take leave before it has accrued, there is a way of dealing with that. The Minister says that similar provisions are longstanding in the state system, for example in the *Government Officers Salaries, Allowances and Conditions Award 1989*.

42 The Minister argues that the reasoning of the Commission in Court Session in *(Commission's own motion) v Dardanup Butchering Co* [2004] WAIRC 2739; (2004) 84 WAIG 2739 at [192] shows that the Union's submissions have no force, because it makes clear that cl 80 is at least capable of applying in the way the Minister says it does, without offending s 25 of the MCE Act in relation to annual leave that accrues during the Leave Year.

43 The Minister argues that the language used in cl 80 is mandatory – 'annual leave rosters shall apply to all officers'. The Minister submits that a plain reading of the Industrial Agreement makes it clear that on commencement, prison officers get their leave letter and their position on the annual leave roster. The Annual Leave Letter is fundamental to the annual leave roster and the taking of annual leave. The Minister argues that the words in cl 80.2 'each group commencing their leave' are significant, and mean that prison officers commence their leave at the time determined in accordance with the place of their Annual Leave Letter in the annual leave roster. If a prison officer starts after the introduction of the annual leave roster, she must be allocated to a group in the roster, and then has the option of taking the balance of the Leave Year's annual leave in advance at the time allocated by her Annual Leave Letter as well as taking the annual leave already accrued for that Leave Year.

44 The Minister argues that cl 80.5 of the Industrial Agreement is very important to this matter. It provides for when a prison officer wishes to 'go outside the roster'. That includes not taking leave that year, or taking annual leave at another time. The words 'a new date' presuppose that a date existed. The Minister says there can be no reason to maintain the integrity of the annual leave roster except if it operates the way the Minister says it does. Prison officers are required to take their annual leave in the Leave Year that the leave accrues. If they do not, then they need to apply to take the annual leave at a different time under cl 80.5, in which case they are still deemed to have taken the annual leave in accordance with the annual leave roster. The Minister argues that this shows how important it is that annual leave is taken. The annual leave roster is framed according to the Annual Leave Letter, with each prison officer's name on it. The prison officers take leave in accordance with it, and if they do not, they need approval. The Minster says: '[i]f any support is required for the view that no application for leave is contemplated, and leave is to be taken in accordance with the leave roster, it is in [cl 80.5]'. An application is only necessary to take leave other than in accordance with the leave roster, but it needs to be supported by 'special reasons', and therefore be exceptional or different to what is ordinary. Even if approval is given, the integrity of the annual leave roster is maintained. Annual leave is accrued not from the date annual leave is actually taken, but from the prison officer's position in the annual leave roster.

45 The Minister submits that cl 81.1 answers the Union's submission in relation to getting a new (different) Annual Leave Letter every year, because there could not be an 'irresolvable conflict' unless the prison officer was already required to take annual leave in accordance with the Annual Leave Letter. The Industrial Agreement provides a mechanism to get a new Annual Leave Letter, but based on operational requirements. Further, the Minister says in the context of a transfer or promotion to another prison, an 'irresolvable conflict' could not arise between the new prison's annual leave roster and the prison officer's original Annual Leave Letter if the taking of annual leave is at the discretion of the prison officer.

46 The Minister says it is clear that cl 80 of the Industrial Agreement is intended to require prison officers to take their annual leave that accrues in any Leave Year at the time allocated to them in the annual leave roster by their Annual Leave Letter, and the Minister says other clauses such as cl 85 and cl 56.3 assume this is the effect of cl 80.

47 The Minister says that cl 82.7 provides in effect that a prison officer can take a single day of annual leave but that is then adjusted on the leave roster, because annual leave is delayed by a rostered shift per single annual leave day taken. Purchased leave is not at large because of cl 138.7 of the Industrial Agreement. Clause 138.7 requires a separate leave roster for purchased leave. All other forms of leave require application and approval under the Industrial Agreement, except for annual leave. The Minister submits that one would expect that annual leave would be highly regulated, given the industrial context. He argues that if the Union's construction were correct, one would expect that the employer would be able to direct when annual leave is taken. There is a good reason why there is nothing in the Industrial Agreement about that – because the taking of annual leave is completely prescribed by the Annual Leave Letter and leave rostering arrangements.

48 In relation to cl 80.6 of the Industrial Agreement, the Minister says it is used as a 'gap filler' for any gaps between leave periods and for other purposes such as training or short-term long service leave/other unspecified forms of leave. There will necessarily be gaps when periods will not all be filled with Annual Leave Letter periods.

49 In effect, the Minister argues that text in the Industrial Agreement is clear and understandable in the context of a prison setting, where it is imperative to maintain reliable, predictable staffing levels. Subject to cl 80.5, as a condition of employment, a prison officer must use their annual leave at the time of their Annual Leave Letter.

50 The Minister says the issue is not the employer directing a prison officer to take annual leave. Rather, the Minister and the Union have agreed that as a condition of employment, prison officers will take annual leave that accrues during any Leave Year at the time determined by the annual leave rosters specified in cl 80. The Minister submits that 'the implications the Applicant seeks to make in [relation] to cl 80 are inconsistent with cl 80 and unnecessary to give it efficacy'.

51 The Minister argues:

> The purpose of annual leave is to provide a necessary break from work to allow for rest and recuperation. In the absence of agreement, industrial instrument provision or legislation allowing for annual leave to be carried forward, it is lost unless taken in the year in which it accrues: *Gordon v Carroll* (1975) 27 FLR 129. By way of illustration clause 23(3)(b) of the *Public Service Award* permits a maximum of 2 years of annual leave from the date of entitlement, subject to the consent of the employer, to be carried forward. Section 23(2a) of the *Minimum Conditions of Employment Act 1993* provides annual leave entitlements are cumulative. Section 24(1) requires untaken annual leave to be paid for on cessation of employment. These provisions are intended to overcome the general position that untaken annual leave is lost if not taken in the year in which accrues. Clause 80 is not unreasonable in providing for annual leave to be taken in the Leave Year in which it accrues.

52 The Minister says that contrary to the Union's submission, cl 81 does not indicate a general intent in the Industrial Agreement that the Minister must deal with the individual circumstances of prison officers beyond as provided by cl 80.5. He says cl 82 does not assist the Union, because single days of annual leave are to be accommodated within the annual leave roster. Further, the Minister denies cl 83 is inconsistent with cl 80 having the meaning and effect proposed by the Minister. Clause 83 only permits cashing out of annual leave from 'previous Leave Years'. The Minister says untaken annual leave can arise by being recalled to duty while on annual leave. Similarly annual leave may be re-credited where a prison officer is confined due to illness (cl 77.3) or where a prison officer is subpoenaed to give evidence on behalf of the State (cl 126.3(b)).

53 The Minister submits that the absence of similar requirements in cl 80 as those in cl 119.2 in relation to long service leave, where if there is no agreement the employer can direct when a prison officer will start long service leave, shows that an application and agreement for annual leave is not required under the Industrial Agreement. Clause 120.1 is not implied into cl 80 and does not qualify it. In a similar vein, the Minister says nothing in cl 138 in relation to purchased leave detracts from the Minister's interpretation of cl 80.

54 The Minister says cl 80 is at least capable of applying as proposed by the Minister without offending s 25 of the MCE Act in relation to annual leave that accrues during the Leave Year. But in any event, the Minister says there has been agreement about when annual leave will be taken, because the Union agreed on behalf of prison officers in negotiating their conditions of employment that annual leave will be taken in accordance with cl 80, which means s 25(1) of the MCE Act does not apply.

55 The Minister argues that the answer to the question is 'Yes'.

Consideration

56 As I said in ***Western Australian Prison Officers' Union of Workers v Minister for Corrective Services*** [2023] WAIRC 00016; (2023) 103 WAIG 93:

> The Commission has the power under s 46 of the IR Act to declare the true interpretation of the Industrial Agreement.
>
> Smith AP (as she was then, with whom Scott CC agreed) set out the role of the Commission and the approach to be taken when interpreting an industrial agreement under s 46 of the IR Act in ***Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, WA Branch*** [2017] WAIRC 00869; [2017] WAIRC 00830. I respectfully agree with her reasoning and apply it in this matter.

The principles that apply to the interpretation of industrial agreements are the principles that apply to interpretation of contracts. The Full Bench said at [21]-[23] of ***Fedec v The Minister for Corrective Services*** [2017] WAIRC 00828; (2017) 97 WAIG 1595:

> [21] The approach that is to be applied when interpreting an industrial agreement is well established. This is:
>
> (a) Industrial agreements are usually not drafted with careful attention to form by persons who are experienced in drafting documents that have legal effect.
>
> (b) The task of construction of an industrial agreement is to be approached in a way that allows for a generous construction: ***City of Wanneroo v Holmes*** [1989] FCA 369; (1989) 30 IR 362.
>
> (c) Industrial agreements are made for industries in light of the customs and working conditions of each industry and must not be interpreted in a vacuum divorced from industrial realities: ***George A Bond & Co Ltd (in liq) v McKenzie*** [1929] AR (NSW) 498; ***City of Wanneroo v Holmes*** (378 - 379) (French J).
>
> [22] The general principles that apply to the construction of contracts and other instruments also apply to the construction of an industrial agreement. In ***Re Harrison; Ex parte Hames*** [2015] WASC 247, Beech J said [50] - [51]:
>
> The general principles relevant to the proper construction of instruments are well-known. In summary:
>
> (1) the 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;
>
> (2) it 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;
>
> (3) the 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;
>
> (4) the 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;
>
> (5) an 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; and
>
> (6) an 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 (***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Kidd v The State of Western Australia*** [2014] WASC 99 [122]; ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 [106] - [112]; ***Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd*** [2014] WASCA 28 [55] (Martin CJ, Pullin & Murphy JJA agreeing)).
>
> These general principles apply in the construction of an industrial agreement (***Director General, Department of Education v United Voice WA*** [2013] WASCA 287 [18] - [20] (Pullin J, Le Miere J agreeing), [83] (Buss J)). The industrial character and purpose of an industrial agreement is part of the context in which it is to be construed (***Amcor Ltd v Construction, Forestry, Mining & Energy Union*** [2005] HCA 10; (2005) 222 CLR 241 [2] (Gleeson CJ and McHugh J); ***Director General v United Voice*** [81]; see also ***Amcor v CFMEU*** 66 (Kirby J), 129 - 130 (Callinan J)).
>
> [23] To these principles, the following observations made by Pullin J in ***Director General, Department of Education v United Voice WA*** [2013] WASCA 287; (2013) 94 WAIG 1 [18] - [19] should be added:
>
> The Agreement has to be construed to determine what the intention of the parties was at the time the Agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the Agreement to mean taking into account the text, the surrounding circumstances known to the parties and the purpose and object of the transaction: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 [40]; ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 [22].
>
> Surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning: ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 352; ***McCourt v Cranston*** [2012] WASCA 60 [23].

When interpreting industrial agreements, the Commission applies the general principles that apply to the construction of contracts, to determine the parties' objective intention as expressed in the text of the industrial agreement having regard to its context.

The Industrial Agreement was made between the Union and Minister. It was registered on 18 December 2020 and its nominal expiry date is 10 June 2022. It applies throughout the Western Australia to prison officers employed in the

classifications set out in Schedule A to the Industrial Agreement. The Industrial Agreement replaces in full the terms of the Prison Officers' Award [37] – [41].

57 I accept the Union's submission that the essential elements of the annual leave provisions in cl 80 of the Industrial Agreement have been in place for many years under previous versions of the industrial agreement.

58 The 'non-leave period' is the period of time in the annual leave roster, made up of three and six weeks, against which there is no Annual Leave Letter. As the Union says, it is a period during which annual leave is not taken. But that does not mean that the Industrial Agreement contemplates that employees can choose not to take annual leave at the time of their Annual Leave Letter. Further, contrary to the Union's submission set out above at [23], in my view the non-leave period can be planned in advance.

59 I cannot accept the Union's submission that reference to the 'non-leave period' in cl 80.6, taken with cl 9, means that it is up to a prison officer to decide whether or not to take annual leave at the time of her Annual Leave Letter. In relation to the Union's argument set out above at [19] about the need for an equitable, uniform approach, in my view the Annual Leave Letter system that the Minister and the Union have agreed to in reaching the Industrial Agreement is that equitable, uniform approach.

60 To the extent it is necessary to deal with the Union's submission that the description 'annual' in relation to the Annual Leave Letter suggests the Annual Leave Letter is given every year, I consider that it is clear that the adjective 'annual' describes the type of leave, not the timing of when the Annual Leave Letter is assigned. It is plain from the Industrial Agreement that a prison officer receives her Annual Leave Letter in writing on commencement at a prison. That Annual Leave Letter is part of a 6 or 8 year roster cycle. A change to a prison officer's Annual Leave Letter is the exception under the Industrial Agreement, not the norm, for example when a prison officer moves to a new prison and there is an 'irresolvable conflict' between that prison's annual leave roster and the prison officer's original Annual Leave Letter. The Annual Leave Letter is not reissued annually.

61 I broadly agree with the Union's argument set out above at [28], but in my view that argument supports the Minister's construction. That argument does not support a construction that a prison officer can choose not to take annual leave at the time of their Annual Leave Letter and can then go on annual leave whenever they choose, as long as they give at least two weeks' notice of the period during which they intend to take annual leave that accrued more than 12 months earlier.

62 In relation to the union's argument set out above at [30] – [31], in my view cl 80 does not expressly limit the accumulation of annual leave from year to year because under cl 80 a prison officer uses annual leave at the time of the Annual Leave Letter, so accumulation is not an issue. Consistent with this construction:

a. there is no need for express words setting out when and in what circumstances the employer can direct a prison officer to start a period of annual leave in accordance with the annual leave roster, or not in accordance with the annual leave roster; and

b. guidance or a process by which a prison officer can apply to *not use* her accrued annual leave is unnecessary.

63 The argument that cl 80.5 provides guidance about how a prison officer can choose not to use her accrued annual leave for each contemplated year of the Industrial Agreement term does not assist the Union. Clause 80.5 makes it clear that it is exceptional to take annual leave other than in accordance with the Annual Leave Letter. In the ordinary course of events, a prison officer's annual leave does not accumulate beyond the timeframes indicated on the roster by the Annual Leave Letter, because prison officers use the annual leave at the time of the Annual Leave Letter.

64 For the reasons given by the Minister and set out above at [52], I consider that cl 82 and cl 83 do not assist the Union. Further, I have carefully considered the rostering provisions under the Industrial Agreement. They do not lead me to prefer the Union's construction.

65 I agree that the Industrial Agreement anticipates and permits annual leave being taken before it accrues. Under cl 79.7 the value of such annual leave is refunded if the prison officer's employment ends before the leave that has been taken accrues. I am not persuaded that the arrangement under cl 80 amounts to a 'cashing out of accrued annual leave' agreement as contemplated by s 8 of the MCE Act, where an employee agrees to forgo taking annual leave in exchange for an equivalent benefit in lieu.

66 I agree with the Minister's submissions set out above at [44]. The language of cl 80 is mandatory. Clause 80.5 is significant, and it provides for when a prison officer wishes to do other than take her annual leave in accordance with the annual leave roster. That prison officer needs special reasons and approval to do so, and the parties to the Industrial Agreement have agreed that that annual leave is deemed to have been taken in accordance with the annual leave roster.

67 Construing the Industrial Agreement as a whole, the intended meaning of cl 80 is that prison officers are divided into groups. Each group is allocated an Annual Leave Letter. A prison officer gets written confirmation of which group she is in when she gets her Annual Leave Letter when she starts at a prison. Each group 'commences' annual leave at 6 or 8 week intervals, according to their Annual Leave Letter. A prison officer can only go on annual leave at a time outside her Annual Leave Letter if she has special reasons for doing so, applies and receives approval. Significantly, even then the Industrial Agreement deems that the prison officer took leave in accordance with the leave roster (so at the time of the Annual Leave Letter).

68 Allowing for a generous construction and that industrial agreements are usually not drafted with careful attention to form by those experienced in drafting statutory instruments or documents with legal effect, I consider that the objective intention, as embodied in the words the parties have used in the Industrial Agreement, is that a prison officer must take annual leave, that is *go on* annual leave, at the time set out in the annual leave roster by the Annual Leave Letter. That is what a reasonable person would have understood the terms of the Industrial Agreement to mean.

69 That construction takes into account the particular industrial context. It goes without saying that predictable, minimum staffing levels are essential for a prison to safely operate. Given the very particular and dangerous environment of a prison, it is

unsurprising that the Union and the Minister have agreed to such specific and regulated annual leave arrangements for many years. The proper operation of a prison involves fairly regulating when leave can be taken, to enable suitable staffing levels and predictable staff availability.

70 If prison officers could choose not to take annual leave at the time of their Annual Leave Letter, they would be able to choose to take annual leave that had accrued over 12 months earlier whenever they liked, simply by giving the employer two weeks' notice, in accordance with s 25 of the MCE Act. Such a construction is at odds with the text of cl 80, which sets out a planned and regulated system of using annual leave. A construction that prison officers can choose not to take annual leave at the time of their Annual Leave Letter makes a 'commercial nonsense' of the very arrangement proposed in cl 80, because it would undermine it entirely.

71 In my view, the construction set out above at [68] is harmonious and consistent with the other clauses of the Industrial Agreement, including those in relation to long service leave and purchased leave. Contrary to the Union's submission, it does not follow from cl 119 and cl 138 that a prison officer can decide whether to use annual leave at all, if they cannot agree with their employer about when to use it. Further, I agree with the Minister and consider that cl 56.3 and cl 85 clearly show an assumption that cl 80 intends to require prison officers to take their annual leave that accrues in any Leave Year at the time allocated to them in the annual leave roster by their Annual Leave Letter.

72 Accordingly, I consider that the parties' objective intention as expressed in the text of the Industrial Agreement, having regard to its context, is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.

73 The answer to the question is 'Yes'.

74 The Commission will declare that the true meaning of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.

2023 WAIRC 00775

INTERPRETATION OF CLAUSE 80 OF THE DEPARTMENT OF JUSTICE PRISON OFFICERS' INDUSTRIAL AGREEMENT 2020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS **APPLICANT** **-v-** MINISTER FOR CORRECTIVE SERVICES **RESPONDENT**
CORAM	COMMISSIONER T EMMANUEL
DATE	TUESDAY, 26 SEPTEMBER 2023
FILE NO.	APPL 18 OF 2021
CITATION NO.	2023 WAIRC 00775

Result	Declaration issued
Representation	
Applicant	Mr C Fordham (of counsel)
Respondent	Mr R Andretich (of counsel)

Declaration

HAVING heard Mr C Fordham (of counsel) on behalf of the applicant and Mr R Andretich (of counsel) on behalf of the respondent;

AND HAVING given reasons for decision;

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

THAT the true meaning of cl 80 of the *Department of Justice Prison Officers' Industrial Agreement 2020* is that prison officers are, as a condition of employment, subject to cl 80.5, to take their annual leave that accrues during the Leave Year at the time determined by the annual leave rosters developed in accordance with cl 80.

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

INDUSTRIAL MAGISTRATE—Claims before—

2023 WAIRC 00768

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	:	2023 WAIRC 00768
CORAM	:	INDUSTRIAL MAGISTRATE E. O'DONNELL
HEARD	:	WEDNESDAY, 8 FEBRUARY 2023
DELIVERED	:	WEDNESDAY, 20 SEPTEMBER 2023
FILE NO.	:	M 54 OF 2022
BETWEEN	:	CARL ASHLEY PARKER
		CLAIMANT
		AND
		SWAN TRANSIT SERVICES PTY LTD
		RESPONDENT

CatchWords	:	INDUSTRIAL LAW – Fair Work Act – Interpretation of industrial agreement – Spread shift – Duration of spread break – applicability of agreement to part-time employees
Legislation	:	*Fair Work Act 2009* (Cth)
Instrument	:	*Swan Transit Enterprise Agreement 2017*
Case(s) referred to in reasons:	:	***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*** [2017] FWCFB 3005 ***Carl Ashley Parker v Swan Transit Services (South) Pty Limited*** [2022] FWC 274
Result	:	Contravention proven; no entitlement to payment from any such contravention.
Representation:		
Claimant	:	M A. Dzieciol (of counsel) and Mr L. Slaney (of counsel)
Respondent	:	Mr S. Clayer (of counsel)

REASONS FOR DECISION

Introduction

1 On 27 November 2019, Swan Transit made an offer of permanent part-time employment as a bus driver to Carl Ashely Parker, with employment to commence on 19 January 2020.

2 In accordance with that offer, from 19 January 2020 until 27 March 2022 (the period of employment), Mr Parker worked for Swan Transit as a bus driver on a permanent part-time basis.

3 At all times during the period of employment, the *Swan Transit Enterprise Agreement 2017* (the Agreement) applied to Mr Parker's employment.

4 It is not in dispute that during the period of employment, Swan Transit was a national system employer, and that the Agreement was an enterprise agreement approved pursuant to s 185 of the *Fair Work Act 2009* (Cth) (FWA).

5 It follows that any contravention of the Agreement would constitute a contravention of s 50 of the FWA and might attract a penalty pursuant to s 539 of the FWA.

I The claim

6 Sub-clauses 7.6, 7.7, 7.8, 7.18 and 7.19 of the Agreement refer to "spread shifts".

7 The term "spread shift" is not defined in the Agreement.

8 However, it is apparent from the evidence (both written and oral) submitted during the case that a "spread shift" is a shift worked in two parts, with an unpaid break known as a "spread break" in between the two parts.

9 Throughout the period of employment, Mr Parker was regularly rostered to work spread shifts.

10 Sub-clause 7.18 of the Agreement provides as follows:

> The break in a spread shift shall be between 91 minutes and 5 hours.

11 It is not in dispute that on most, if not all, occasions when Mr Parker was rostered to work a spread shift, the break between the two parts of his shift was greater than 5 hours.

12 Mr Parker claims that Swan Transit contravened sub-cl 7.18 of the Agreement on every occasion it rostered him in such a way that his spread break was greater than 5 hours.

13 By way of remedy, Mr Parker asks the Court to impose a penalty upon Swan Transit for its contravention of the Agreement, pursuant to s 539 of the FWA.

14 As originally pleaded, Mr Parker's claim also encompassed a claim for unpaid wages on the basis that every time his spread break exceeded 5 hours, he was entitled to be paid overtime wages for the duration of the break beyond the 5-hour mark.

15 However, at the close of evidence at the trial, the claim for unpaid wages was withdrawn, so that no claim for overtime wages, or any other type of unpaid wages, is now pursued (ts 33).

16 Swan Transit denies the claim and contends that sub-cl 7.18 applied only to full-time employees and had no application to part-time employees.

17 For the reasons that follow, I find the contravention proven.

II Did sub-clause 7.18 of the Agreement apply to part-time drivers?

18 Swan Transit submits that sub-cl 7.18 had no application to part-time employees. It makes that submission on two bases.

(i) The context of sub-clause 7.18

19 The first argument Swan Transit makes is based on the location of sub-cl 7.18 in the Agreement.

20 Sub-clause 7.18 appears in clause 7 of the Agreement, which is entitled "Hours of Employment".

21 The first sub-clause under that heading, sub-cl 7.1, provides:

> The ordinary hours of work for a full-time Employee shall not exceed 38 hours per week excluding meal breaks and will be rostered Monday to Friday. Work on Saturdays, Sundays and Public Holidays shall be rostered overtime.

22 Swan Transit seizes upon sub-cl 7.1 to advance the argument that cl 7, and consequently sub-cl 7.18, must apply only to full-time employees. To fortify that submission, Swan Transit notes that cl 8 of the Agreement is entitled "Part-Time Employment" - meaning, it submits, that cl 8 encompasses the terms applicable to part-time employees, while "the rights and entitlements contained in clause 7 applied to full-time drivers".[1]

23 I am not persuaded by this aspect of Swan Transit's argument.

24 As noted above, cl 7 of the Agreement is entitled "Hours of Employment".

25 While sub-cl 7.1, immediately following that heading, pertains to the hours of work for a full-time employee, it does not follow that the remainder of cl 7 applies only to full-time employees.

26 Clause 7 contains 32 sub-clauses and is divided into the following sub-headings:

a. Daily Shifts
b. Meal, Rest and Crib Breaks
c. Weekly Rosters.

27 By contrast, cl 8 contains a total of nine sub-clauses and no sub-headings. It is limited to the subject of hours to be worked, rates of pay and how overtime applies to part-time employees.

28 As a matter of common sense, the sub-clauses of clause 7 must, prima facie, apply to part-time employees. If they did not, part-time employees would be deprived of significant entitlements under the Agreement pertaining to topics including, but not limited to, meal and rest breaks.

29 In fact, some of the evidence led in the case, to which I will now refer, illustrates the point that cl 7 must be applicable to part-time employees.

30 Sub-clause 7.32 provides:

> Exchange of work:
>
> (a) An Employee may exchange work with other Employees for their personal convenience, provided such change is with the consent of the Employer.
> (b) Where a request is made before 5:00pm on the Friday 10 days before the roster commences a response shall be provided by 5:00pm on the Wednesday following the request.
> (c) Rostered hours shall be calculated on the basis of the work performed.
> (d) The Employee who accepts the shift so exchanged shall be responsible for completing that shift.

31 Swan Transit's case included uncontested evidence by way of affidavit from Sharif Hossain and Mark Edward Dickson. Mr Hossain and Mr Dickson both state that Mr Parker would often swap shifts with others.[2] Mr Hossain states that in his role as Depot Coordinator of the Joondalup depot, he would regularly process shift swap forms from Mr Parker.[3]

32 I find on the balance of probabilities that these shift swaps were facilitated in accordance with sub-cl 7.32, and that this is an example of the direct application of a sub-clause within cl 7 having direct application to a part-time employee.

(ii) Is there any evidence that displaces the prima facie application of sub-clause 7.18 to part-time employees?

33 The second, more nuanced argument Swan Transit makes effectively seeks to go behind the prima facie meaning and application of sub-cl 7.18. That argument is to the effect that the parties to the Agreement, including the Transport Workers' Union, always understood that sub-cl 7.18 had no application to part-time employees.

34 This is essentially the same argument as was made by Swan Transit in the s 739 FWA dispute resolution proceedings before Deputy President Beaumont of the Fair Work Commission (FWC). In her decision following those proceedings,[4] Deputy President Beaumont expressed the opinion that sub-cl 7.18 of the Agreement did apply to part-time employees.

35 The Deputy President's opinion on the issue is not binding upon me, but it is persuasive.

36 The evidence led before me by Swan Transit, particularly through Swan Transit's Managing Director Brian Thompson, explained in detail why it would not have been practical to ensure that part-time drivers never had spread breaks longer than 5 hours.

37 That evidence was characterised by an attractive logic, and I accept, based on that evidence, that if Swan Transit had adhered strictly to the terms of sub-cl 7.18 in rostering its part-time drivers, all drivers would have been negatively affected (ts 25; 27).

38 Consequently, based on the industrial implications of rostering part-time employees strictly in accordance with sub-cl 7.18, I am prepared to accept that there was an ambiguity as to whether sub-cl 7.18 could or did have application to Swan Transit's part-time employees.

39 As noted by Deputy President Beaumont,[5] where there is an ambiguity in the interpretation of a provision of an industrial instrument:

The following principles from *Berri*([6]) assist with resolving the question of whether there are any objective facts that would assist in the task of interpretation:

> The common intention of the parties is sought to be identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement, without regard to the subjective intentions or expectations of the parties.
>
> …
>
> If the language of the agreement is ambiguous or susceptible of more than one meaning then evidence of the surrounding circumstance will be admissible to aid the interpretation of the agreement.
>
> The admissibility of evidence of the surrounding circumstances is limited to evidence tending to establish objective background facts which were known to both parties which inform the subject matter of the agreement. Evidence of such *objective* facts is to be distinguished from evidence of the *subjective* intentions of the parties, such as statements and actions of the parties which are reflective of their actual intentions and expectations.
>
> Evidence of objective background facts will include:
>
> (i) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;
>
> (ii) notorious facts of which knowledge is to be presumed; and
>
> (iii) evidence of matters in common contemplation and constituting a common assumption.
>
> The diversity of interests involved in the negotiation and making of enterprise agreements (see point 4 above) warrants the adoption of a cautious approach to the admission and reliance upon the evidence of prior negotiations and the positions advanced during the negotiation process…
>
> Admissible extrinsic material may be used to aid the interpretation of a provision in an enterprise agreement with a disputed meaning, but it cannot be used to disregard or rewrite the provision in order to give effect to an externally derived conception of what the parties' intention or purpose was.
>
> ……post-agreement conduct which amounts to little more than the absence of a complaint or common inadvertence is insufficient to establish a common understanding [3], [10 - 15].

40 Swan Transit submits that on consideration of evidence of the objective background facts which were known to the parties, and which inform the subject matter of the Agreement, it is clear that the parties never intended sub-cl 7.18 to apply to part-time drivers.

41 The problem Swan Transit has in this respect is a lack of evidence as to precisely what was discussed in the bargaining of the Agreement.

42 Under cross-examination by counsel for the claimant, Mr Thompson conceded (ts 25-26) that:

a. he could not confirm whether the issue of sub-cl 7.18 was discussed in bargaining negotiations in 2005, 2008, 2012, 2016 or 2017;

b. Swan Transit had not produced in evidence before the Court any minutes of those historical bargaining meetings leading up to the formulation of the Agreement.

43 In the absence of evidence of the discussions had between the parties, Swan Transit's evidence at trial only manages to prove its own subjective intentions as to the operation of sub-cl 7.18. It falls well short of establishing either:

a. notorious facts of which knowledge is to be presumed; or

b. evidence of matters in common contemplation and constituting a common assumption.

44 As to post-agreement conduct, the fact that Swan Transit rostered its part-time employees on spread shifts with breaks greater than 5 hours is only evidence of its subjective approach to the Agreement; and the lack of any complaint about that practice until Mr Parker made his complaint is, as *Berri* makes clear, insufficient to establish a common understanding.

45 The evidence led before me does not significantly differ from the evidence led before the FWC; consequently, I echo the observation of Deputy President Beaumont that the evidence does not support a finding that "the operation of subclause 7.18 was a notorious fact of which knowledge is to be presumed or its limitation to full-time employees was in common contemplation and constituted a common assumption."[7]

III Findings

46 For the same reasons as those outlined by the learned Deputy President in the FWC proceedings, I find that sub-cl 7.18 of the Agreement applied to part-time drivers.

47 On each occasion when Swan Transit rostered Mr Parker to work spread shifts containing spread breaks of greater than 5 hours, it contravened sub-cl 7.18 of the Agreement.

48 However, I am not satisfied that every line of Mr Parker's spread sheet pertains to a spread shift with a break of greater than 5 hours. This is because there is uncontested evidence from Mr Hossain and Mr Dickson to the effect that Mr Parker regularly requested "straight" shifts. There is also evidence from Mr Thompson that Mr Parker said he was "not overly keen on spreads" (ts 22), which supports the evidence of the other witnesses that on some occasions, Mr Parker swapped his rostering with other drivers in order to work "straight" shifts.

49 On the basis of that evidence and on the balance of probabilities, I find that some of the entries on the spreadsheet pertain to days when Mr Parker had done a swap with another employee and had effectively worked two separate "straight" shifts, contrary to his original roster.

50 It is not possible for me to determine, therefore, on how many occasions Mr Parker worked a spread shift with a break of greater than 5 hours.

51 It does appear, though, that more than 20% of Mr Parker's total shifts rostered contained a spread break of greater than 4 hours. If so, that would constitute a contravention of sub-cl 7.19 of the Agreement.

52 As to that issue, Deputy President Beaumont said,[8] and I agree:

> Swan Transit placed weight on the inclusion of subclause 7.19 through bargaining, which it said addressed spread shifts with a break greater than four hours being limited to 20% of the total spread shifts rostered for *full-time drivers*. However,

> no evidence was adduced to support Swan Transit's proposition that the inclusion of subclause 7.19 was limited in its operation to full-time employees. There was no evidence of prior negotiations regarding subclause 7.19 or evidence to suggest that its operation was in common contemplation.

53 Even after those findings, this claim did not include an assertion that Swan Transit had contravened sub-cl 7.19.

54 The fact that Mr Parker does not claim any contravention of sub-cl 7.19 is telling.

55 Mr Parker gave the following evidence at trial (ts 10):

> I have no problems with working and had no problems with working or having a six-hour spread break or a seven-hour spread break or an eight-hour spread break. The EBA and the basis of that is that a spread break is unpaid. As far as my interpretation goes of the EBA, the maximum unpaid spread break is five hours. If Swan wish to roster me for a six-hour spread break or a seven-hour spread break or an eight-hour spread break, I don't have a problem with that. The requirement is that anything over five hours is paid.

56 There is nothing in the Agreement to support Mr Parker's assertion that "anything over five hours is paid". Swan Transit's submissions on that point are entirely correct, and that point was correctly conceded, and that aspect of the claim withdrawn, at the close of the case (ts 33-34).

57 Secondly, that evidence, in conjunction with the lack of any claim of contravention of sub-cl 7.19, leads me to the view that Mr Parker experienced no inconvenience whatsoever because of the rostering of spread breaks longer than 5 hours.

IV Orders

58 The claim is allowed, to the extent that:

(a) Swan Transit contravened sub-cl 7.18 of the Agreement by rostering Mr Parker to work spread shifts with a spread break greater than 5 hours; but

(b) Swan Transit is not liable to pay any additional wages to Mr Parker as a result of that contravention.

59 I will hear submissions as to penalty in due course.

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[1] Respondent's submissions, [32].
[2] Exhibit 4, [4] – [5]; Exhibit 5, [7].
[3] Exhibit 4, [5].
[4] ***Carl Ashley Parker v Swan Transit Services (South) Pty Limited*** [2022] FWC 274.
[5] *Ibid.,* [83].
[6] ***Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Berri Pty Limited*** [2017] FWCFB 3005.
[7] ***Carl Ashley Parker v Swan Transit Services (South) Pty Limited*** [2022] FWC 274, [104].
[8] *Ibid.,* [100].

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2023 WAIRC 00765

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIVE ANDREW SMITH
	APPLICANT
	-v-
	PEOPLE WHO CARE
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	TUESDAY, 19 SEPTEMBER 2023
FILE NO/S	U 58 OF 2023
CITATION NO.	2023 WAIRC 00765

Result	Application discontinued by leave
Representation	
Applicant	Mr C Smith
Respondent	Ms P Webb and Ms M Scates

Order

WHEREAS the applicant advised the Commission that they wish to discontinue application U 58 of 2023 on Tuesday 5 September 2023;

AND WHEREAS the respondent does not object to the appeal being discontinued;

NOW THEREFORE the Commission pursuant to its powers under the *Industrial Relations Act 1979* orders –

THAT application U 58 of 2023 be and by this order is discontinued.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

CONFERENCES—Matters arising out of—

2023 WAIRC 00781

DISPUTE RE DEMOTION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A.
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 2 OCTOBER 2023
FILE NO.	C 37 OF 2023
CITATION NO.	2023 WAIRC 00781

Result	Order issued
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr J Carroll (of counsel)

Order

WHEREAS on 27 September 2023 the applicant filed a *Form 1B – Application for a Conference - s 44, Industrial Relations Act 1979*, and on 28 September 2023 the respondent raised a jurisdictional objection;

AND WHEREAS by Notices of Hearing issued on 28 September 2023 the respondent's jurisdictional objection was set down for hearing on 5 October 2023;

AND WHEREAS on 29 September 2023 the applicant sought leave to discontinue the matter, and on 2 October 2023 the respondent consented to the applicant discontinuing the matter;

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

THAT matter C 37/2023 be, and by this order is, discontinued by leave.

(Sgd.) C TSANG,
[L.S.] Commissioner.

UNIONS—Matters dealt with under Section 66

2023 WAIRC 00798

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROMINA AIDA RASCHILLA AND OTHERS
	APPLICANTS
	-v-
	AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION WORKERS PERTH
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 6 OCTOBER 2023
FILE NO/S	PRES 2 OF 2023, PRES 3 OF 2023, PRES 4 OF 2023, PRES 5 OF 2023, PRES 6 OF 2023, PRES 7 OF 2023, PRES 8 OF 2023, PRES 9 OF 2023, PRES 10 OF 2023, PRES 11 OF 2023, PRES 12 OF 2023
CITATION NO.	2023 WAIRC 00798

Result	Order issued
Representation	
Applicants	Mr D Stojanoski of counsel and with him Mr C Fordham of counsel
Respondent	Ms B Burke of counsel

Order

HAVING HEARD Mr Stojanoski of counsel and with him Mr C Fordham of counsel on behalf of the applicants and Ms B Burke of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders–

THAT application PRES 7 of 2023 be and is hereby discontinued by leave.

(Sgd.) S J KENNER,

[L.S.] Chief Commissioner.

2023 WAIRC 00799

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROMINA AIDA RASCHILLA AND OTHERS **APPLICANTS** **-v-** AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION WORKERS PERTH **RESPONDENT**
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	FRIDAY, 6 OCTOBER 2023
FILE NO/S	PRES 2 OF 2023, PRES 3 OF 2023, PRES 4 OF 2023, PRES 5 OF 2023, PRES 6 OF 2023, PRES 8 OF 2023, PRES 9 OF 2023, PRES 10 OF 2023, PRES 11 OF 2023, PRES 12 OF 2023
CITATION NO.	2023 WAIRC 00799

Result	Order issued
Representation	
Applicants	Mr D Stojanoski of counsel and with him Mr C Fordham of counsel
Respondent	Ms B Burke of counsel

Order

HAVING HEARD Mr Stojanoski of counsel and with him Mr C Fordham of counsel on behalf of the applicants and Ms B Burke of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders–

(1) THAT the names of persons set out at par 16(a) of the 'applicants' proposed amendments to applicants' claims; and applicants' submissions in response to respondent's application under s 27(1)(a)' filed on 28 July 2023 be and are hereby to be kept confidential and are not to be published in any manner.

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

(Sgd.) S J KENNER,

[L.S.] Chief Commissioner.

2023 WAIRC 00806

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2023 WAIRC 00806
CORAM	:	CHIEF COMMISSIONER S J KENNER
HEARD	:	FRIDAY, 18 NOVEMBER 2022, WEDNESDAY, 23 NOVEMBER 2022, THURSDAY, 27 APRIL 2023, FRIDAY, 28 APRIL 2023 WRITTEN SUBMISSIONS 5 MAY & 15 MAY 2023
DELIVERED	:	TUESDAY, 10 OCTOBER 2023
FILE NO.	:	PRES 10 OF 2022
BETWEEN	:	SAMANTHA FENN Applicant AND THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH First Respondent AND THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION Second Respondent AND THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION Intervenor

Catchwords	:	Industrial law (WA) - Application under s 66 – alleged irregularities in Union elections – Standing to challenge election result - Timing of election - Irregularity in connection with an election - Relevant principles - Whether failure to comply with orders of Commission regarding contravention of rules as to election - Whether union deliberately failed to distribute reasons to members - Whether this could constitute an irregularity - Relevant principles applied - Postal ballot and whether delays occurred by postal system - Whether an irregularity occurred - No irregularity - Application dismissed
Legislation	:	*Fair Work Act 2009* (Cth) *Fair Work (Registered Organisations) Act 2009* (Cth) s 206; s 206(5) *Industrial Arbitration (Union Elections) Regulations 1980* (WA) reg 5; reg 6(1)(d); reg 7(1); reg 7(2); reg 8(1); reg 11; reg 11(a); reg 11(b); reg 11(c); reg 11(d); reg 14; reg 18(1); reg 18(4); reg 20(1) *Industrial Relations Act 1979* (WA) Part IIB, Division 4; s 6(f); s 7; s 52; s 52A; s 55; s 56; s 56(1); s 56(1)(d)(iii); s 57; s 57(2); s 61; s 63(1)(a); s 64; s 66; s 66(1)(a); s 66(1)(c); s 66(2); s 66(2)(ca); s 66(2)(e); s 66(2)(f); s 68; s 69; s 69(1); s 69(2); s 69(5); s 69(5)(a); s 69(7); s 69(12); s 70; s 71; s 71A; s 74; s 80; s 113(1)(f) *Interpretation Act 1984* (WA) s 10(c); s 3(1)(b)
Result	:	Application dismissed
Representation:		
Counsel:		
Applicant	:	Mr D Rafferty of counsel
First Respondent	:	Ms B Burke of counsel
Second Respondent	:	Ms S Keighery of counsel
Intervenor	:	Mr J Carroll of counsel
Solicitors:		
Applicant	:	Eureka Lawyers
First Respondent	:	ANF Legal Services
Second Respondent	:	State Solicitor's Office
Intervenor	:	State Solicitor's Office

Case(s) referred to in reasons:

Attorney General (Cth) v Oates [1999] HCA 35; (1999) 198 CLR 162

Avenell and Another v The Returning Officer, State School Teachers' Union of WA (Inc) (1993) 73 WAIG 2939

Clancy v The Australian Nursing Federation Industrial Union of Workers Perth [2022] WAIRC 00325; (2022) 102 WAIG 1235; [2022] WAIRC 00330; (2022) 102 WAIG 1240; [2022] WAIRC 00331; (2022) 102 WAIG 1240

Clancy, in the matter of an application for an enquiry in relation to an election for offices in the Australian Nursing and Midwifery Federation [2017] FCA 460

Dwyer v President and Returning Officer, State School Teachers' Union of WA (Inc) (1990) WAIG 3980

Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd [2004] NSWSC 754

Harken v Dornan and Ors (1992) 72 WAIG 1727

Jabbcorp (NSW) Pty Ltd v Strathfield Golf Club [2021] NSWCA 154

Jones v Dunkel (1959) 101 CLR 298

Nimmo, in the matter of an application for an inquiry relating to an election for an office in the Australian Education Union (NT Branch) [2011] FCA 38

Perret v Robinson [1988] HCA 41; (1988) 169 CLR 172

Piper v Corrective Services Commission of New South Wales (1986) 6 NSWLR 352

R v Gray; Ex Parte Marsh (1985) 157 CLR 351

Re Application for an enquiry into an election for officers in the Transport Workers' Union of Australia, Western Australian Branch (FCA Lee J unreported 11 April 1990)

Re Birch; Re Australian Workers Union (SA Branch) (No2) (1991) 37 IR 420

Re Collins; Ex Parte Hockings (1989) 167 CLR 522

Re Communication Workers' Union of Australia Postal and Telecommunications Branch, New South Wales (1996) 67 IR 246

Rogers v Sideris and Ors and Tomlinson (1983) 64 WAIG 262

The Registrar v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch (1997) 77 WAIG 1391

The Registrar v The Australian Nursing Federation Industrial Union of Workers Perth [2022] WAIRC 00681; (2022) 102 WAIG 1315; [2022] WAIRC 00684; 102 WAIG 1327

The Registrar v The Shop, Distributive and Allied Employees' Association of Western Australia (1996) 76 WAIG 1705

Thompson v Reynolds [2009] WAIRC 00024; (2009) 89 WAIG 28

Reasons for Decision

The application

1 The applicant, Ms Fenn, has been a nurse for about 29 years, since 1993. For most of her nursing career, Ms Fenn has been a member of the first respondent, the Australian Nursing Federation, and its counterpart federal body, the Western Australian Branch of the Australian Nursing and Midwifery Federation.

2 As a result of proceedings before me, under s 66 of the *Industrial Relations Act 1979* (WA), and orders I made on 3 and 4 August and 21 and 23 September 2022, an election by postal ballot for office bearers of the first respondent was held on 17 October 2022. Ms Fenn stood as a candidate for the office of Secretary. On 18 October 2022, the second respondent, the Western Australian Electoral Commission, declared the result of the election for office holders and, amongst others elected, Ms Reah was elected the ANF Secretary by a margin of 56 votes over Ms Fenn.

3 As a consequence of this result, and events leading up to it that I shall describe in more detail below, Ms Fenn challenged the election under s 66(2)(e) of the *Act*, on the basis of alleged irregularities in connection with it. The three grounds originally advanced in the amended application were:

(a) that the WAEC failed to provide sufficient time for the return of the postal ballots from members;

(b) that the ANF Roll of Electors included unfinancial members; and

(c) that the ANF failed to comply with my declaration and orders of 23 September 2022, which held that the ANF failed to comply with its Rules in not holding the election within the time as prescribed, by failing to distribute the decision and orders in a timely manner. It was contended that this may have influenced voting intentions in the election.

4 The ground in par 3(b) above was later abandoned by Ms Fenn.

5 Declarations and orders sought in these proceedings are to the effect that the election result should be declared void, and a fresh election should be held. Additionally, Ms Fenn seeks an alteration to the Rules of the ANF, to extend the minimum time required for the distribution of ballot papers for an election from 14 days to 28 days, as is the case in the Rules relating to elections of the ANF's counterpart federal body, the Australian Nursing and Midwifery Federation.

6 Both the ANF and the WAEC oppose the application and deny that there was any irregularity in its conduct. Whilst the Registrar was an intervenor in the proceedings, her role was limited to providing discovery of relevant documents to the parties. Additionally, she made written submissions regarding the interaction between the *Act* and the *Industrial Arbitration (Union Elections) Regulations 1980* (WA) in relation to elections, and relevant rules of the ANF in relation thereto.

7 A preliminary issue also arises in these proceedings. It is whether Ms Fenn may challenge the result of the election of all office holders, or whether she is restricted to only challenging the result for the election of the Secretary, being the position she contested.

Background and summary of facts

8 I have been assisted in this matter by the filing of comprehensive, and careful written submissions from counsel and a Statement of Agreed Facts, as to matters which are not controversial. I am grateful for this assistance. This background is drawn from the Statement. I make the following findings.

9 The ANF, as a registered organisation under the *Act*, has constitutional coverage of nurses. At the time of the events leading to these proceedings, it had some 37,000 members. For about 25 years, until mid-2022, the Secretary of the ANF was Mr Olson. Mr Olson resigned from the Secretary position and became the Chief Executive Officer of the ANF at that time. As a consequence of Mr Olson's resignation, the ANF Council appointed Ms Reah to the position of Secretary by the filling of a casual vacancy under the ANF Rules.

10 As a result of proceedings before me under s 66 of the *Act,* on 3 August and 4 August 2022, I published reasons for decision and orders to the effect that the obligation on the ANF to hold an election in accordance with r 20 of its Rules, between 1 July 2022 and 31 August 2022, be waived. I further ordered that an election for office bearers of the ANF be held by no later than 30 November 2022: ***Clancy v The Australian Nursing Federation Industrial Union of Workers Perth*** [2022] WAIRC 00325; (2022) 102 WAIG 1235; [2022] WAIRC 00330; (2022) 102 WAIG 1240; [2022] WAIRC 00331; (2022) 102 WAIG1240.

11 In the meantime, existing office bearers were to continue holding office until the declaration of the election result.

12 On 21 and 23 September 2022, as a result of proceedings under s 66 of the *Act* commenced by the Registrar, regarding non-compliance by the ANF with its Rules in relation to the conduct of an election, I published further reasons for decision and orders. Those were to the effect that the ANF had failed to comply with its Rules in failing to hold an election within the time required; requiring the ANF to take steps to notify its members of its non-compliance, including my decision; and to notify the Registrar of steps taken by the ANF to ensure that its Rules in relation to elections would be complied with in the future: ***The Registrar v The Australian Nursing Federation Industrial Union of Workers Perth*** [2022] WAIRC 00681; (2022) 102 WAIG 1315; [2022] WAIRC 00684; 102 WAIG 1327.

13 The ANF wrote to the Registrar on 11 August 2022 and requested that an election be conducted for the following office holders:

Senior Vice President;

Vice President x 2;

Secretary;

Executive Member x 2;

Councillor x 7.

14 In accordance with s 69 of the *Act*, the Registrar issued a decision that the ANF's request for an election to fill the above vacancies had been 'duly made', and arrangements were made with the WAEC for the conduct of the election. As a result, the WAEC appointed Mr Ardeshir, an employee of the WAEC with experience in the conduct of elections, as the Returning Officer.

15 Mr Ardeshir contacted Mr Olson on 15 August 2022, proposing a timetable for the conduct of the election in the following terms:

- *Advert to be published in the West – Monday 22 August*
- *Opening of Nominations – Monday 29 August*
- *Close of the roll – Monday 5 September*
- *Close of Nominations - Monday 12 September*
- *Ability to withdraw nomination – Last day is Monday 19 September*
- *Mailout of the packages (assuming we proceed to election) - Monday 26 September*
- *Election Day – Monday 17 October 10.00 am*

16 Shortly after this contact, on the same day, as noted above, Mr Olson resigned as Secretary of the ANF and Ms Reah was appointed to the position through a casual vacancy.

17 As required by s 63(1)(a) of the *Act*, the ANF has a register of members, that, at the time, contained some 37,660 recorded members. A Roll of Electors was provided by the ANF to the WAEC in early September 2022, which comprised some 36,974 members. This was amended shortly after, by an amended Roll of Electors, comprising some 35,992 members, following the removal of retired members.

18 By 12 September 2022, on the close of nominations, there were more nominations than available positions for each office. Accordingly, the Returning Officer proceeded to conduct an election.

19 Preparation of ballot papers by the WAEC was intended to take place on 21 and 22 September 2022. However, on the passing of Her Majesty Queen Elizabeth II, a National Day of Mourning public holiday was proclaimed for Thursday 22 September. This meant that the ballot papers were not completed until Friday 23 September 2022. Whilst the timetable for the election provided for the lodgement of ballot papers with Australia Post on Monday 26 September 2022, as this was the Kings Birthday public holiday, this did not occur until the following day, on Tuesday 27 September 2022.

20 On this day, 35,988 ballot papers were lodged with Australia Post for delivery.

21 In relation to the non-receipt of ballot papers, there were communications between Mr Olson and Mr Ardeshir in late September 2022. These referred to communications with ANF members about receipt of ballot papers by post, to the effect that if members had not received them by 11 October 2022, they should contact the WAEC regarding a replacement. At around the same time, Ms Fenn also began raising concerns with the WAEC regarding the non-receipt of ballot papers, based on contact with her from members. Additionally, in early October 2022, the WAEC made enquiries of Australia Post regarding the non-delivery of ballot papers to a number of postcode areas in the State. After some enquiries, Australia Post advised the WAEC that there were no issues specific to mail delivery centres that it could identify.

22 Some 23 ANF members contacted the WAEC directly during the period 7 October to 13 October 2022 for replacement ballot papers, which were dispatched to them by express post. These members resided mainly in the metropolitan area of Perth, but also a few resided in the regions. Some nine ANF members contacted the union either during or after the election, to raise issues regarding the non-receipt of ballot papers. The WAEC has no record of any of them making contact with it about this matter.

23 On 18 October 2022, the WAEC certified the election results. The declaration signed by Mr Ardeshir stated that, for the position of Secretary, Ms Reah received 2,056 votes and Ms Fenn received 2000 votes. A third candidate, Ms Ziggi, received 336 votes. Between 18 October and 28 October 2022, the WAEC received a total of 446 late ballot papers from members of the ANF who voted. A total of 463 unopened ballot papers were returned to the WAEC, as undeliverable mail.

24 On 20 October 2022, the ANF President, Ms Fowler, sent an email to ANF members advising of the election result. In it, Ms Fowler also included a copy of my decision and orders dated 21 and 23 September 2022, referred to earlier in these reasons, with the notation 'please also find attached the decision of the WAIRC in relation to the timing of the election'. No other description as to the content of the decision, which was some 26 pages long, was provided to members.

Approach to election challenges

25 The Chief Commissioner's jurisdiction concerning elections in organisations is found in ss 66(2)(e) and (f) of the *Act*, which are as follows:

> (2) On an application made pursuant to this section, the Chief Commissioner may make such order or give such directions relating to the rules of the organisation, their observance or non-observance or the manner of their observance, either generally or in the particular case, as the Chief Commissioner considers to be appropriate and without limiting the generality of this subsection may —
>
> …
>
> (e) inquire into any election for an office in the organisation if it is alleged that there has been an irregularity in connection with that election and make such orders and give such directions as the Chief Commissioner considers necessary —
>
> (i) to cure the irregularity including rectifying the register of members of the organisation; or
>
> (ii) to remedy or alter any direct or indirect consequence of the irregularity;
>
> and
>
> (f) in connection with an inquiry under paragraph (e) —
>
> (i) give such directions as the Chief Commissioner considers necessary to the Registrar or to any other person in relation to ballot papers, envelopes, lists, or other documents of any kind relating to the election;
>
> (ii) order that any person named in the order must or must not, as the case may be, for such period as the Chief Commissioner considers reasonable in the circumstances and specifies in the order, act or continue to act in and be taken to hold an office to which the inquiry relates;
>
> (iii) declare any act done in connection with the election to be void or validate any act so done.

26 For the purposes of s 66(2)(e), an 'irregularity' is defined in s 7 of the *Act* to be:

> ***irregularity***, in relation to an election for an office, includes a breach of the rules of an organisation, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;

27 Sections 66(2)(e) and (f) of the *Act* are discrete powers contained within the broad scope of s 66 as a whole. As such, as a matter of construction, the powers available to be exercised by the Chief Commissioner regarding enquiries into elections in an organisation are limited to those specifically enunciated in ss 66(2)(e) and (f) of the *Act*, but the broad powers contained in the general introductory part in s 66(2) are not available to be exercised: ***Harken v Dornan and Ors*** (1992) 72 WAIG 1727 per Rowland J at 1730-1732 (Franklyn and Ipp JJ agreeing).

28 The meaning of 'irregularity' for the purposes of the statutory definition in s 7 of the *Act* was also the subject of consideration by the Industrial Appeal Court in ***Harken.*** This arose in the context of a comparison between the relevant provisions of s 66 of the *Act* and corresponding provisions of the Commonwealth legislation at the time, which were not materially different. As to these matters, Rowland J said at 1730 as follows:

> The Commonwealth legislation is in terms substantially the same as s 66(2)(e). Each Act talks in terms of "an irregularity in connection with that election". Each Act defines irregularity in substantially the same terms. The West Australian Act provides:

> "irregularity", in relation to an election for an office, includes a breach of the rules of an organization, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;"

In Re Collins at 524 Brennan and Deane JJ summarised the matters:

> "Gaudron J. has outlined the circumstances and the statutory framework in which the question arose whether a use of union resources to promote a ticket in a union election amounts to an 'irregularity in or in connexion with an election' within the meaning of that term in Pt IX of the Conciliation and Arbitration Act 1904 (Cth). In Reg. v. Gray; Ex parte Marsh (20), Gibbs CJ. said:
>
> > 'The notion of an irregularity, in relation to an election, involves the idea of some departure from some rule, established practice or generally accepted principle governing the conduct of the election.' (Emphasis added.)
>
> As appears from that judgment and its reference to Evans v. Crichton-Browne (21), an irregularity is not 'in or in connexion with an election' if the irregularity consists merely in the steps taken to affect voting intention but leaves untouched the processes of nomination, conduct and declaration of the poll. This is such a case.
>
> As Gaudron J. points out, if an irregularity which affects merely the formation of voting intentions were capable of amounting to an 'irregularity in or in connexion with an election', an inquiry into the effect of the irregularity on the result of the election would involve a very substantial intrusion into the secrecy of the ballot. For these reasons we agree that the view taken by Gray J. in setting aside the subpoenas was correct."

In her reasons, Gaudron J found added support for reaching the same conclusion in the provisions of s 161 of the Commonwealth Act. She said at 531-532:

> "Significantly, s. 165(4) limits the powers of the Court in an inquiry pursuant to s.161 of the Act by providing:
>
> > 'The Court shall not declare an election, or any step taken in or in connection with an election, to be void, or declare that a person was not elected, unless the Court is of opinion that, having regard to the irregularity found, and any circumstances giving rise to a likelihood that similar irregularities may have occurred or may occur, the result of the election may have been affected, or may be affected by irregularities.'
>
> The sub-section recognizes that an act or omission constituting an irregularity may be such that, ex post facto, it can be seen that it has not or will not affect the election result. But, it also impliedly recognizes that an irregularity is constituted by an act or omission which has a tendency to affect an election result and the impact or likely impact of which can be ascertained in the course of an inquiry. Assuming that it is possible to ascertain whether or not advocacy in favour of a particular candidate or particular candidates had a causative influence on the voting decisions of electors or some of them, the question whether there was an impact or likely impact on the election result could only be ascertained by a very substantial intrusion into the secrecy of the ballot. The Act, in ss. 133 and 133AA, contained detailed provisions for secret ballots in union elections, and, in my view, there is nothing to be found in the Act permitting of an inference that an inquiry might be conducted so as to require an elector to disclose for whom he or she voted or for whom he or she would have voted but for the advocacy which led to his or her decision. Unless such could be done, an inquiry into matters of electioneering would, at least in the ordinary course of events, be an inquiry lacking any purpose relevant to the orders which may be made by the Federal Court in consequence of a finding that there was an irregularity in or in connexion with the election. For this reason, I conclude that the expression 'irregularity in or in connection with an election', as used in the Act, does not encompass those activities by which candidates or persons acting in their interests seek, by their advocacy or by promoting or publicising such advocacy, to influence voters in their decision for whom to vote. Accordingly, the matters complained of are not capable of constituting an irregularity in or in connexion with an election."

Counsel for the respondents claimed that this was a distinguishing feature of the two legislative schemes. They claimed that the West Australian Act did not have a provision similar in terms to s 161. There were two answers to that. First, there are other provisions in the West Australian legislation which give some support for similar considerations. These are contained in ss 69(4), (5)(a) and (7); 56(l)(a)(d); 55(l)(e) and 57. Secondly, and more importantly in my view, the rationale behind the reasoning in The Queen v. Gray; Ex parte Marsh (1985) 157 CLR 351, relied upon by all members of the court in Re Collins, was based on avoiding an "intrusion into the secrecy of the ballot".

In my opinion, the dicta of the various Judges of the High Court who have dealt with the words used, both in Gray and Re Collins is binding on us in a case which cannot in any relevant way be distinguished.

29 The Federal Court adopted the same broad approach to the meaning of 'irregularity' regarding election enquiries under the *Fair Work (Registered Organisations) Act 2009* (Cth): ***Clancy, in the matter of an application for an enquiry in relation to an election for offices in the Australian Nursing and Midwifery Federation*** [2017] FCA 460 per Siopis J at [69] to [70] (see too: ***Thompson v Reynolds*** [2009] WAIRC 00024; (2009) 89 WAIG 28).

30 There is one notable difference between ss 66(2)(e) and (f) of the *Act* compared to the corresponding provisions of the *FW (RO) Act* in s 206, as pointed out by Ms Fenn in her submissions. Under s 206(5) of that legislation, there is an additional requirement, not present in s 66 of the *Act*, that as well as a finding of an irregularity, the Court must conclude that the election may have been, or may be, affected by it.

Standing

31 The ANF and WAEC contended that Ms Fenn only had standing to challenge the election for the office of Secretary, that being the office she nominated for, and she was not able to challenge the result of the election generally for all officers. For the following reasons, this contention must be rejected.

32 The starting point must be the terms of the statute. By s 66(1)(a), a person who is, or has been, a member of an organisation may make an application to the Chief Commissioner to 'enquire into an election *for an office* in an organisation …' By s 7 of the *Act*, an 'office' is defined to mean:

> ***office*** in relation to an organisation means —
>
> (a) the office of a member of the committee of management of the organisation; and
>
> (b) the office of president, vice president, secretary, assistant secretary, or other executive office by whatever name called of the organisation; and
>
> (c) the office of a person holding, whether as trustee or otherwise, property of the organisation, or property in which the organisation has any beneficial interest; and
>
> (d) an office within the organisation for the filling of which an election is conducted within the organisation; and
>
> (e) any other office, all or any of the functions of which are declared by the Commission under section 68 to be those of an office in the organisation,
>
> but does not include the office of any person who is an employee of the organisation and who does not have a vote on the committee of management of the organisation;

33 As noted above, 'irregularity' in relation to an election, is defined to mean that relating to an election 'for an office'. As a matter of interpretation, in a written law, by s 10(c) of the *Interpretation Act 1984* (WA), words in the singular number include the plural and vice versa. This is, of course, subject to a contrary intention or object in the particular Act, or where the subject matter or context suggests otherwise: s 3(1)(b) *Interpretation Act*.

34 Section 66 is contained in Division 4 of Part IIB of the *Act*, which makes provision for industrial organisations and associations. The word 'office', as a defined term in s 7, and as it relates to an organisation, appears extensively in the *Act*, in ss 52, 52A, 55, 56, 57, 64, 68, 69, 70, 71, 71A, 74 and 80. These provisions of the *Act* refer to the registration and control of organisations and the obligations of officers, occupying an office in an organisation. In particular, I note s 69, which sets out the procedure for an election 'for an office' in an organisation being conducted by the Registrar, or by the WAEC. If the submissions of the ANF and the WAEC are to be accepted, then it is difficult to see how, under s 69(1), an election in an organisation can be for more than a single office holder position.

35 There are, however, other reasons why this challenge to Ms Fenn's standing cannot succeed. A principal object the of the *Act* in s 6(f) is to encourage the democratic control of organisations. As to this matter, in my decision regarding the enforcement proceedings in ***The Registrar, Western Australian Industrial Relations Commission***, referred to above, I said at [56] to [57] as follows:

> 56 In ***Harry Arnott v Western Australian Police Union of Workers*** [2022] WAIRC 00208; (2022) 102 WAIG 369, I referred to the importance of democratic control of registered organisations under the *Act*, and said at [74] to [75]:
>
> > 74 It is trite that the powers in s 66 of the Act, are to be exercised consistent with the objects of the Act in s 6 and consistent with s 26(1) of the Act. A principal object of the Act in s 6(e) concerns the formation of representative organisations of employers and employees … and their registration under the Act. Additionally, s 6(f), importantly for present purposes, provides as follows:
> >
> > (f) to encourage the democratic control of organisations so registered and the full participation by members of such an organisation in the affairs of the organisation; and
> >
> > …
> >
> > 75 These are important objects of the Act in relation to organisations. Free and fair elections, and encouraging full participation by members of an organisation in its affairs, is a touchstone of the democratic process. It is a condition of registration of an organisation under Part II Division 4 of the Act, that the rules of the proposed organisation make provision for a proper voting system, subject to independent scrutiny. Civil penalty provisions exist in the Act for contraventions of voting processes or where threats or forms of intimidation of candidates or voters occur. These various provisions of the Act, underscore the importance placed on democratic principles and the full participation of members of an organisation in its affairs, consistent with the principal objects of the Act in ss 6(e) and (f).
>
> 57 This is also inherent in the respondent's Rules in rule 3(1) to the extent that the respondent is to 'promote and protect the interests of members …' It is plainly in the interests of members that they fully participate in the affairs of the respondent and as I noted above in ***Arnott***, this is a touchstone of the democratic process.

36 It is consistent with this object, and also the ANF Rules, that current or former members of an organisation be able to invoke the jurisdiction of the Chief Commissioner under s 66 of the *Act*, in relation to an election. Importantly, there is no requirement for a person making an application under s 66(2)(e) of the *Act,* to have been a candidate in an election. Although, the jurisdiction is no doubt invoked more commonly by such persons. The only attribute to satisfy the standing requirement is current or former membership of an organisation, as required by s 66(1)(a). I see no reason not to construe s 66(2)(e) of the *Act*, in accordance with s 10(c) of the *Interpretation Act*, and given the objects of the *Act* in s 6(f), every reason to do so. In my view, the focus of ss 66(2)(e) and (f) is on an election as a process or an event, the substance of which may include single or multiple offices in an organisation.

37 It would be incongruous to say the least, if, on an election enquiry under s 66(2)(e), the Chief Commissioner determined that there existed a systemic irregularity that infected an entire election, but, because an applicant could only challenge the election for one office holder position which they contested, the remainder of the elected officeholders would continue to be regarded as validly elected. Their continuation in office would be tainted with illegitimacy. In my view, such a construction of s 66 of the *Act* would be wholly inconsistent with the principal object in s 6(f), and could not have been the intention of the Parliament when enacting such provisions.

38 Accordingly, Ms Fenn has standing to seek the orders and declarations she does, in relation to the elected office holders as set out at [5] of her amended application and [12] above of these reasons.

Non-compliance with orders

39 The background to this issue is set out in the affidavit of Ms Fenn. Whilst I found her to be a credible witness from her cross-examination, the ANF objected to much of her affidavit in support of her application. The ANF objections related to relevance, hearsay and assertions of vexatious content. On a fair reading of it, the affidavit also contained material that was unsubstantiated opinion, and not helpful to the Commission in the disposition of these proceedings. In this respect, I refer to [28], [66], [71], [86] and [93]. I will not place any weight on that evidence. In other respects, those parts of the evidence objected to will be matters of weight.

40 There are other aspects of Ms Fenn's affidavit the subject of complaint from the ANF, that may be said to relate to her motivation for her decision to stand for the office of Secretary, both in the 2018 election and the 2022 election. To the extent that those parts of her affidavit make allegations against the ANF, Mr Olson and Ms Reah, without those matters having been put to Mr Olson or Ms Reah, I will not have regard to those matters.

41 The ANF filed an affidavit by Mr Olson. No request was made by Ms Fenn to cross-examine him. Likewise, whilst Ms Reah was not called to give evidence by the ANF, as there is no property in a witness, it was open to Ms Fenn to call Ms Reah, by summons, if necessary, if she intended to pursue the issues alleged in her affidavit. However, despite this, as to the submission as to whether I should draw a ***Jones v Dunkel*** ((1959) 101 CLR 298) inference by the ANF's failure to call Ms Reah to give evidence, and also the alleged failure by Mr Olson to give a more fulsome explanation of why my reasons and orders of September 2022 were not distributed timeously to members of the ANF, I will refer to this issue further below.

42 It was uncontroversial, as set out at [9] to [11] of the Statement, that there was a change of leadership in the ANF following Mr Olson's decision to not contest the election for the Secretary position, after about 25 years in that office. However, the assertion in Ms Fenn's written submissions at [36] and [39] and the corresponding passages in Ms Fenn's affidavit referred to in the submissions, as to the alleged motivations by the ANF, Mr Olson and Ms Reah, are not matters I can place any weight on.

43 What I can conclude is that over a period of time, on Ms Fenn's evidence, she formed the opinion that the then leadership of the ANF was not providing the level of service to the members of the union that she considered they deserved. This led her to decide to stand for election for the position of Secretary both in 2018 and in 2022. This was her democratic right as a member of the ANF, and she exercised it.

44 It was also uncontroversial, as noted above, that as a result of orders I made under s 66 of the *Act* in early August 2022, the time for the election to be conducted was extended to 30 November 2022 at the latest, and the requirements of r 20 of the ANF Rules were waived. As noted above in these reasons, and as set out in the Statement at [21] to [32], the Registrar requested, and the WAEC agreed, on 15 August 2022, to conduct the election for office holders of the ANF. In my view, given the steps then undertaken by Mr Ardeshir as the Returning Officer on that day, the election process can be taken to have been commenced from the time of the publication of the Election Notice in the *West Australian* newspaper on 22 August 2022 (see ATB80-81).

45 As to this ground of challenge, it was contended by Ms Fenn that the delay in providing a copy of my reasons and order of 21 and 23 September 2022 in the enforcement action brought by the Registrar, to members of the ANF, until after the declaration of the election result, was deliberate. It was submitted by Ms Fenn that this was done by the ANF to avoid scrutiny by members of the union as to the failure by the then Secretary and others, to ensure compliance with the Rules as to the timing of the election. This was said to have been done to avoid any adverse views that may have been formed by members in their decision as to who to vote for. The evidence of Mr Olson in his affidavit and the submissions of the ANF generally, that the absence of a date for compliance in the relevant part of my order of 23 September 2022, was said by Ms Fenn to be 'disingenuous, opportunistic and self-serving' (written submissions at [49]).

46 Whilst Ms Fenn submitted that it should have been expected that Mr Olson would have dealt with these and other matters as to assertions about the ANF conduct in his affidavit, as I have already mentioned, Mr Olson was not requested to attend the hearing to be cross-examined on his evidence. In the case of a witness who files an affidavit and is then cross-examined, the cross-examination is not limited to matters contained in the affidavit and the witness is at large. The witness may be cross-examined on any matter relevant to the issues arising in the proceedings.

47 In considering the contentions advanced by Ms Fenn in relation to this first alleged irregularity, it is necessary to return to my decision in the enforcement proceedings. In ***Registrar WAIRC***, the issue was the failure by the ANF to comply with its Rules, (specifically r 20) to make a request for an election to be conducted by the Registrar, within the time specified in the rule, that being between 1 July and 31 August of the relevant year. The matter before me in those proceedings involved some complexity, in terms of the operation of the relevant provisions of the *Act* as to elections, and the interpretation of the ANF Rules in relation to these matters. My reasons for decision ran to some 26 pages and 91 paragraphs. After considering the evidence and the arguments of the parties, I expressed some criticism of the ANF and concluded at [82] to [83] as follows:

> 82 In this case, on all the evidence, I am satisfied that the respondent has contravened rule 20(1) of its Rules in that it has not made an election request to the applicant in good time, such that the election required to be conducted could

be conducted between 1 July and 31 August in this election year. All that was required by the respondent, in electing to make a request to the Registrar under s 69, was to write a letter. Nothing more was required. It is clear on the evidence of Ms Bastian, and from the communications with the WAEC, that there was no prospect that a request made by the then Secretary of the respondent, Mr Olson, in mid-July, could enable an election to be properly conducted by the WAEC between 1 July and 31 August.

83 Furthermore, I am satisfied on the evidence that the reasons proffered by Mr Olson for the non-compliance, demonstrates a somewhat lax attitude towards the important issue of the timely conduct of elections within the respondent. As was common ground, this is now the second occasion on which a late request for such an election has been made by the respondent, requiring remedial action under s 66 of the *Act*. The justification for the lateness in taking the simple step of writing to the Registrar, being short-staffed and Mr Olson was busy, was inadequate. Importantly, it is not just the Secretary who is responsible for taking timely steps to ensure that an election is commenced and conducted. It is the responsibility of the Council to ensure that the organisation's Rules are complied with. Oversight of this process is important.

48 As to the order sought by the Registrar, that notice of my decision be given to members of the ANF, I observed at [86]:

86 As to an order that due notice be given of this decision to members of the respondent, consistent with principles of openness, transparency, and the importance of democratic processes, as emphasised in the objects of the Act, such an order will be made. I will also order the respondent to outline steps it will take to ensure compliance in the future.

49 I should also say that in the proceedings leading to the making of the orders, Mr Clancy, the then Senior Industrial Officer and Vice President of the ANF gave evidence as to reservations that he had that the enforcement proceedings were being heard at a time when the election was about to take place. He was concerned that candidates in the election, including Ms Fenn, may seek to use the outcome of the proceedings for their own purposes: at [53].

50 As a result, the relevant order that I made on 23 September 2022 was order 2 in the following terms:

(2) ORDERS that the respondent take all reasonable steps (including by distributing a copy of the herein reasons for decision and declaration and orders) to notify its members of its failure to comply with rule 20 of its registered Rules.

51 As noted earlier in these reasons, on 20 October 2022, following the declaration of the election result by the WAEC, an email was sent to ANF members by Ms Reah, enclosing a message from the President of the union Ms Fowler, in relation to the election results and also, enclosing a copy of my decision and orders in the enforcement proceedings. The message read 'Please also find attached the decision of the WAIRC in relation to the timing of the election'. (ATB at p 1659). There is no further explanation of what, as I have said above, was a lengthy decision dealing with some complex questions of law.

52 From its terms, my order imposed two requirements on the ANF. The first, was to take reasonable steps to notify members of the union's failure to comply with r 20 of its Rules. The second, was to distribute to members a copy of my reasons for decision and orders. The parties and their written and oral submissions focussed on the latter part of my order. However, the distribution of my reasons and orders, would not of itself, meet the requirements of the order as a whole. Simply distributing them, without explanation, as occurred on 20 October 2022, in an email from Ms Reah, with a message from Ms Fowler the President to the effect 'Please find attached the decision of the WAIRC in relation to the timing of the election.', was not consistent with the obligation imposed on the ANF by the order. There was nothing in the email from Ms Reah to explain the content of the decision and order.

53 Nothing in that communication would have drawn members' attention to the fact that the ANF had failed to comply with r 20 of its Rules, as was required. It was unambiguously clear from par [86] of my reasons, set out above, that the Commission expected openness and transparency by the ANF with its members on this issue. What occurred was anything but. Not only was the issue of non-compliance not communicated clearly as required, but the non-compliance was cloaked in a veneer of inconsequence, as if the decision and order simply dealt with the 'timing' of the election. It did not. It dealt with much more than that.

54 In these circumstances, as Ms Reah would have been the person to give evidence about the timing and content of the message in the 20 October 2022 email to members, I do find that the failure by the ANF to call Ms Reah to explain the late distribution of my decision to members, without proper explanation, leads to a ***Jones v Dunkel*** inference.

55 However, despite this conclusion, a larger issue arises as to whether the failure by the ANF to timeously distribute a copy of my decision and orders in the enforcement proceedings, without any proper explanation of the ANF's non-compliance with r 20 of its Rules, was a matter that could give rise to an irregularity, given their content. Put another way, could the timing and distribution of my decision, with or without any explanation, be a matter capable of constituting an irregularity for the purposes of ss 7 and 66(2)(e) of the *Act?* If the answer to that question is no, then the related issues such as the motives of the ANF, and the conduct of its relevant officers, either by express words or overt conduct, or inferences sought to be drawn from it, are not relevant and are not capable of being taken into account.

56 Returning then to the principles established in both ***R v Gray; Ex Parte Marsh*** (1985) 157 CLR 351 and ***Re Collins; Ex Parte Hockings*** (1989) 167 CLR 522, discussed and applied in ***Harken*** above. It is clear that an 'irregularity' for the purposes of ss 7 and 66(2)(e) of the *Act* must involve a matter in connection with the election process itself. Matters concerned with the formation of voting intention, in terms of who voters may be inclined to vote for, impermissibly stray into the secrecy of the ballot process. Whilst the situations that may fall into this impermissible area of enquiry are not closed, the High Court decisions in both ***R v Gray*** and ***Re Collins*** were concerned with the distribution of pamphlets and other publications and the use of union resources to promote certain candidates in an election, without such material and resources being available to other candidates. A similar factual situation arose in ***Harken***.

57 In this case, Ms Fenn was clearly alive to the difficulties created for her by these authorities, in relation to this ground of challenge, by her attempts to characterise my decision and orders in the enforcement proceedings as matters in connection with the 'machinery of the election'. It was submitted that the enforcement proceedings were 'connected with and operated on the Extension of Time Proceedings' (written submissions at [56c]). It was submitted that the outcome of the enforcement proceedings required the ANF to take a step during the election to inform members of the ANF's non-compliance. It was contended that the failure to take this step 'caused the election to be conducted, in the view of the members, as if there had not been non-compliance with the Rules' (written submissions at [56e]).

58 The extension of this theme, in Ms Fenn's submissions, was that this conduct by the ANF contravened r 3 of its Rules, which deals with the objects of the union, and was an irregularity 'because the conduct deprived members of knowledge and information which may have influenced the manner in which they could decide to cast their vote…' (written submissions at [57]). It is this last part of Ms Fenn's submissions on this ground, that, whilst it must ultimately be stated, reveals the difficulties she faces in establishing it.

59 Before getting to this point, however, there is another difficulty with Ms Fenn's arguments. There are three limbs to the first part of s 66(2)(e) of the *Act*. They are:

(a) an inquiry into an election for an office in an organisation;

(b) an alleged 'irregularity' (as defined in s 7 of the *Act*) *in connection with that election* (my emphasis); and

(c) the making of such orders and directions as the Chief Commissioner considers necessary;

if an allegation of an irregularity is established.

60 The proceedings that came before me under s 66 of the *Act* in early August 2022, on the application of the ANF, sought the waiver of r 20 of the ANF's Rules, to enable a timetable to be established for the conduct of an election to take place at a point in time in the future. In that case, there was evidence before me that the ANF had requested the Registrar to arrange for the conduct of an election and the WAEC had informed the Registrar that there was insufficient time to do so because of the lateness of the ANF's request: see ***Clancy*** at [4].

61 As a result of those proceedings, whilst I expressed some concerns with the delay in the request for an election and that this was the second occasion where orders to waive r 20 of the ANF Rules were sought by it, I made the orders so that an election could take place. I observed in my reasons that, whilst I had the above concerns, I would say no more about those matters because I noted that the Registrar already had proceedings on foot, in relation to the alleged non-compliance by the ANF with r 20 of its Rules, which ultimately led to my orders in the enforcement proceedings, being made in September 2022.

62 What follows from the above is that first, the extension of time proceedings were not proceedings in connection with an 'election for an office in an organisation' for the purposes of s 66(2)(e) of the *Act*, because no election could take place unless I made the orders as I did. Plainly, the reference to 'election' in s 66(2)(e) is a reference to an election that is being or has been conducted. The orders I made in early August 2022 facilitated the subsequent conduct of the election. As I have mentioned above, the election got underway on the confirmation by the WAEC of the appointment of the Returning Officer, Mr Ardeshir, and the taking of preliminary steps to establish a timetable and put arrangements in place for the conduct of the election, leading to the Election Notice in late August 2022.

63 Second, from the Registry records of the Commission, the application in ***Registrar WAIRC***, under s 66 of the *Act,* in relation to the contravention of r 20 of the ANF Rules, was filed on 25 July 2022. The Registrar has standing of her own motion, under s 66(1)(c) of the *Act*, to make an application to the Chief Commissioner in relation to the rules of an organisation, their observance or non-observance, or the manner of their observance. Thus, the application made by the Registrar was filed well before the election took place. In my view, they were discreet proceedings brought by the Registrar, as she is authorised to do, in the nature of enforcement, in response to the ANF' s non-compliance with its obligation to request an election in the time specified in r 20 of its rules.

64 I therefore do not consider those proceedings can be regarded as proceedings 'in connection with the election', which election commenced in or about late August 2022, and concluded with the declaration by the WAEC on 18 October 2022, for the purposes of s 66(2)(e) of the *Act*, despite the width of this phrase (see ***Nimmo, in the matter of an application for an inquiry relating to an election for an office in the Australian Education Union (NT Branch)*** [2011] FCA 38 per Reeves J at [64]). Those earlier proceedings were properly characterised in my view, as proceedings in connection with compliance and non-compliance by an organisation with its rules. The primary relief sought in those proceedings was a declaration that the ANF had failed to comply with its rules. That is a subject matter of the preliminary part of s 66(2) of the *Act.* It has no part to play in s 66(2)(e) and (f).

65 As I have already noted, s 66(2)(e) proceedings in relation to an election are discrete and quite separate from proceedings in relation to the enforcement of the rules of an organisation: ***Harken***. The order which I made, for a copy of my reasons for decision and order to be provided to members of the ANF, was an ancillary order to the primary relief sought and granted, in those enforcement proceedings.

66 In the alternative, if I am incorrect and the enforcement proceedings were proceedings in connection with the election, then I am not persuaded that if there was a failure to comply with the order by the ANF, it could constitute an irregularity. This is because, in my view, the provision of my reasons and orders, with or without explanation, could only possibly serve the purpose of influencing voting intentions, and the argument is put by Ms Fenn that they *may* have influenced voting intentions. Had my reasons and orders been distributed to members of the ANF at the outset of the election or some time prior to the close of the ballot, other candidates may have sought to use the decision and orders and any explanation, to criticise the ANF and its leadership. This may have, in turn, led the ANF to defend itself, and the other candidate likewise.

67 In my view, this sort of conduct, and the use of my reasons and orders for this purpose, could only be reasonably regarded as a form of 'electioneering'. Either way, the only possible impact on members who may have taken the time to read my lengthy

reasons, could be an attempt to influence those voters to vote for one candidate over the other, which the High Court has said is an 'intrusion into the secrecy of the ballot': ***Re Collins*** per Gaudron J at 531.

68 For these reasons, I am not persuaded that there has been an irregularity in relation to the election on this basis.

Failure by returning officer to extend the ballot

Preliminary question

69 In determining this alleged irregularity, a preliminary issue arises as to the obligations imposed on a Returning Officer in Mr Ardeshir's position, under the *Act*, the *Regulations* and r 23(4)(a) of the ANF Rules. In this connection, the Registrar and the parties made further written submissions. The point that arises is whether the Returning Officer is obliged, as a mandatory duty, to take all reasonable steps to ensure no irregularity occurs in connection with an election. Alternatively, whether a Returning Officer has a discretion in this regard. The question arises in this case because Ms Fenn contended that Mr Ardeshir had a duty to act to extend the closing date for the ballot, once he became aware that there may be delays by Australia Post in the delivery of ballot papers to members of the ANF.

70 The contention regarding a mandatory duty was said to arise from r 23(4)(a) of the ANF Rules, which is in the following terms:

> (4) (a) The Returning Officer shall take such actions and give such directions as are reasonably necessary in order to ensure that no irregularities occur in or in connection with any election or plebiscite and in order to rectify any procedural defects and no person shall refuse or fail to comply with such directions or obstruct or hinder the Returning Officer or any other person in the conduct of such election or plebiscite or in the taking of any such action.

71 On the other hand, the WAEC contended that Mr Ardeshir, as the Returning Officer for the election, had a discretion whether to take action or not. This was submitted to arise from the terms of s 69(5) of the *Act* which provides:

> (5) Notwithstanding anything contained in the rules of the organisation, the person conducting the election may take such action and give such directions as the person considers necessary in order —
>
> (a) to ensure that no irregularities occur in or in connection with the election; or
>
> (b) to rectify the register of members of the organisation; or
>
> (c) to remedy procedural defects which appear to the person to exist in those rules.

72 There is a further overlay to these contentions, and that is the question of what obligations are imposed on a Returning Officer, by the *Regulations*. I will return to this issue a little later.

Registrar

73 The Registrar made detailed and helpful written submissions in relation to these issues. The WAEC and Ms Fenn replied to the Registrar's submissions. Additionally, in her written submissions, Ms Fenn referred to reg 11 of the *Regulations*, dealing with the steps a Returning Officer is obliged to take in relation to the commencement and close of a ballot for an election for office in an organisation. It was submitted that, in the context of the evidence led in this case, that the Returning Officer should have had regard to the outer time limit for the conduct of the ballot, that being 30 November 2022, as contained in my order of 3 August 2022. Further, in establishing the time required to send and return ballot papers by post, Mr Ardeshir should have had regard to the deteriorating situation with Australia Post, as a mandatory requirement.

74 Whilst I consider the matters raised by Ms Fenn in her reply submissions are within the scope of my direction of 1 May 2023, which directed the parties to file written submissions on the relationship between provisions of the *Act* and *Regulations* which regulate or relate to the conduct of an election, and the rules of an organisation, in an election under s 69 of the *Act*, the WAEC took some exception to the reference to reg 11 in Ms Fenn's submissions and contended that it was a 'new matter'. I do not consider this necessarily to be so. Nonetheless, I provided the Registrar and the other parties a further limited opportunity to respond to Ms Fenn's written submissions on this issue. None indicated any wish to do so.

75 The Registrar set out in her written submissions relevant provisions of the *Act* in relation to registered organisations and their registration and the relationship between those provisions and the Rules of an organisation. As to the registration of an organisation under Division 4 of Part II of the *Act*, the Registrar contended that a number of provisions of the *Act* are of significance. It was noted that in relation to the registration of an organisation, the Commission in Court Session must refuse an application for registration if the rules of an organisation in relation to elections do not satisfy s 56(1) of the *Act*, notably that they must 'ensure as far as practicable, that no irregularity can occur in connection with an election': s 56(1)(d)(iii). Notably too, attention was drawn to s 57 of the *Act*, which is in the following terms:

> **57. Elections by direct voting system to be by secret postal ballot**
>
> (1) Every election by a direct voting system for an office in an organisation must be by secret postal ballot.
>
> (2) The regulations may make provision for and in relation to the conduct of an election in accordance with the requirements of this section.
>
> (3) Where the rules of an organisation as in force at the date of the coming into operation of this section provide for an election or elections to which this section applies to be by a secret ballot other than a secret postal ballot, the Registrar may, upon application by the organisation in accordance with the regulations, by instrument in writing under the Registrar's hand, exempt the organisation in respect of an election from the application of this section if the Registrar is satisfied that the conduct of the election in accordance with those rules —

(a) is likely to result in a fuller participation by members of the organisation in the ballot than would result from a postal ballot; and

(b) will afford members entitled to vote an adequate opportunity of voting without intimidation.

(4) This section, and the regulations made for the purposes of this section, have effect notwithstanding anything contained in the rules of an organisation.

(5) This section does not apply to an election any step in which was taken, in accordance with the rules of the organisation, before the date of the coming into operation of this section.

76 Reference was also made by the Registrar to s 69 of the *Act*, which permits an election to be conducted by the Registrar and it was submitted that the terms of s 69(5) set out above, confer a discretion on a person conducting an election to do certain things and that this discretion is to be exercised 'Notwithstanding anything contained in the rules of an organisation…'

77 As to the *Regulations*, the Registrar submitted that most appear to have been made under s 113(1)(f) of the *Act*, read relevantly with ss 57(2), 69(2) and 69(12) of the *Act,* respectively. In particular, regs 5 to 22, deal with procedures and steps to be taken in the conduct of an election, consistent with s 57(2) of the *Act*. The general submission was made by the Registrar that whilst the rules of an organisation are not made by the Commission, and nor are they made under the *Act* per se, they are subject to and, to an extent, are regulated by the *Act*.

78 In the context of this general background, the broad submission was made by the Registrar that in the case of any inconsistency or conflict between the *Act* and the *Regulations* made under it, and the rules of an organisation, the former will prevail. The Registrar submitted that there are a number of reasons for this. First, an organisation's rules, whilst not made under the *Act* or by the Commission, are given statutory effect by the legislation. Given that upon registration an organisation and its members are subject to the jurisdiction of the Commission and the Court (the Industrial Appeal Court) under the *Act*, and the Commission has the capacity to refuse registration of an organisation if its rules do not meet certain statutory requirements, then construed as a whole, this means that rules of an organisation are 'subject to' the *Act* and *Regulations*, in the ordinary sense, and are subsidiary and should be seen as subsidiary.

79 Second, the subsidiary nature of rules is demonstrated by the requirement that certain subject matters are to be included in rules and the regulation making power as to required subject matter.

80 Thirdly, where under s 61 of the *Act*, reference is made to members being bound by the rules of an organisation, 'subject to this Act', this demonstrates the subsidiary relationship between rules of an organisation and the *Act,* with the latter prevailing in the case of an inconsistency.

81 Finally, the Registrar made reference to the broad powers under s 66 of the *Act*, by which the Chief Commissioner may disallow any rule which, in his opinion, is contrary to or inconsistent with any Act or law. In further support of this submission, specific reference was made to s 66(2)(ca), empowering the Chief Commissioner to give directions on a disallowance of a rule, to the effect of validating or giving effect to anything done under a disallowed rule. This was submitted to suggest that upon a disallowance, a rule is rendered void *ab initio*, (and thus never having had effect) whilst there existed inconsistency.

82 It was submitted that the decision of Sharkey P in ***The Registrar v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch*** (1997) 77 WAIG 1391 at 1393, appeared to support the Registrar's general approach. Although she made that submission with a caveat to the effect that the reasons for judgement did not make it entirely clear whether his Honour was referring to the submissions made by counsel, or whether they were a statement of his understanding of the general law. In my view, from his Honour's reasons read as a whole, the latter is to be preferred.

WAEC

83 On behalf of the WAEC, it was submitted that the prevalence of s 69(5) of the *Act* over r 23(4)(a) of the ANF Rules is maintained. The WAEC otherwise adopted the Registrar's submissions on these matters. The WAEC reiterated that the Returning Officer was not required to comply with r 23(4)(a), but in any event, on the evidence, he did so.

Ms Fenn

84 In response, Ms Fenn's general submission was that she did not cavil with the Registrar's analysis as to the operation of s 69 of the *Act*. Insofar as the Registrar referred to elections which may not be conducted under s 69, as set out at [14] to [15] of the Registrar's submissions, Ms Fenn submitted that those matters were beyond the scope of the matters in issue in these proceedings and are hypothetical.

85 Ms Fenn referred to relevant provisions of the *Regulations*, in connection with an election conducted under s 69 of the *Act.* These provisions are to be read with relevant parts of a union's rules. In particular, Ms Fenn submitted that having regard to regs 5, 6(1)(d), 7(1) and (2), 8(1), 11(d), 14, 18(1) and (4) and 20(1), in the case of an election conducted under s 69 of the *Act*, the procedure for each election may be different, depending on upon the content of the relevant union's rules and the interaction of those rules with the *Regulations*.

86 As to the power and requirement to prevent irregularity, Ms Fenn made a number of submissions. Her overarching submission was that the combined effect of the *Act*, the *Regulations*, and the relevant rules of an organisation concerning elections, are such that a Returning Officer must ensure that no irregularity occurs in connection with an election. It was submitted that this results from any provision of an organisation's rules meeting the requirements of s 56(1)(d)(iii) imposing a requirement to prevent irregularity, or, by the requirement imposed by s 69(5)(a) of the *Act*, in the event that the relevant provision in an organisation's rules contains a lesser standard than that provided in the *Act*. As I understood the submissions, they were reasoned as follows.

87 The Commission in Court Session is required to scrutinise the proposed rules of an organisation for seeking registration which must meet the requirements of s 56(1)(d)(iii). It was submitted that an organisation, including a rule consistent with s 69(5)(a) of the *Act*, within its rules as a whole, may meet the requirements of s 56(1)(d)(iii). Alternatively, the Registrar, in relation to an organisation registered before s 56 came into effect, may require an organisation to bring its rules into conformity.

88 The submission was made that despite these provisions, s 69(5)(a) was enacted as effectively a 'fallback' provision, providing a minimum standard for compliance. Ms Fenn accepted that the words 'Notwithstanding anything contained in the rules of the organisation', require an organisation's rule(s) to give way to s 69(5)(a) of the *Act* where there is a conflict and agreed with [18] of the Registrar's submissions in that respect (see also ***Jabbcorp (NSW) Pty Ltd v Strathfield Golf Club*** [2021] NSWCA 154). Despite this concession, however, Ms Fenn submitted that in circumstances where an organisation's rules provide for a higher standard in relation to ensuring that no irregularity can occur in connection with an election, then it would prevail over s 69(5)(a). This was so, according to Ms Fenn, because, if it were not the case, an organisation would have no basis to include a more stringent requirement in its rules, which would negate the introductory words in s 69(5)(a) just referred to and would undermine s 56(1)(d)(iii).

89 On these bases, Ms Fenn contended that the terms of r 23(4)(a) of the ANF Rules, is not displaced and there is no conflict. Both the rule and s 69(5) have a common purpose. The mandatory intent of r 23(4)(a) is consistent with the intention of the *Act* in relation to the avoidance of irregularities in connection with an election.

90 An alternative submission was put by Ms Fenn to the effect that even where a conflict occurs between r 23(4)(a) and s 69(5), there is no displacement of the effect of the rule because its operation involves no constraint on the requirement and power imposed on a Returning Officer under the *Act*. A Returning Officer acting under r 23(4)(a) is not prevented from exercising any authority or power referred to in s 69(5)(a), rather it is required to be exercised. The upshot of these submissions according to Ms Fenn, was that there was an obligation on Mr Ardeshir as the Returning Officer to comply with r 23(4)(a) of the ANF Rules in relation to the election and he was bound to comply.

91 In relation to reg 11 of the *Regulations*, Ms Fenn made the general submission that from the terms of reg 11, it is implicit that a Returning Officer when setting a date for the issuance of ballot papers and the closing date for the ballot, that those dates must enable a sufficient time for the ballots to be posted to voters, for the ballots to be completed and for them to be returned by post. In my view, when read as a whole, especially reg 11(b), this is an explicit obligation.

92 Ms Fenn submitted that, on the evidence, Mr Ardeshir was unaware of the end date of the election that I fixed, of 30 November 2022, in my order of 4 August 2022. Ms Fenn contended that it was Mr Ardeshir's duty to know the outer limit of the timing of the election, as required by reg 11(a). It was submitted therefore, that the Returning Officer failed to have regard to this mandatory consideration. Additionally, Ms Fenn submitted that Mr Ardeshir was required to have regard to reg 11(b), in terms of the time required to send and return ballot papers by post. The submission was that this involved an assessment of the prevailing postal conditions and an allowance made to ensure compliance with reg 11(b). In this regard, given the end date of 30 November 2022, this provided sufficient flexibility for Mr Ardeshir, in light of the deteriorating postal conditions, to enable a proper judgement to be made.

93 In effect, Ms Fenn contended that the Returning Officer adopted an inflexible approach to the election timing of a 'standard' three weeks as is the WAEC usual practice, or by referring to the minimum 14day requirement specified by r 23(1)(g) of the ANF Rules. She submitted this did not satisfy the obligation imposed on the Returning Officer to exercise his powers to ensure that no irregularity occurred in the election. Furthermore, Ms Fenn submitted that no Returning Officer, acting reasonably and having regard to the terms of reg 11, would require the lodgement of ballot packages for the election on the King's Birthday public holiday. This is especially in circumstances where the postal conditions were deteriorating, and where the 'standard' three-week period for a closing date of 17 October 2022, was adopted.

94 It was submitted that a Returning Officer, acting reasonably, would have taken advantage of the maximum end date for the election of 30 November 2022, to extend the ballot closing date beyond 17 October 2022, given all of the circumstances. It was thus submitted by Ms Fenn, that the Returning Officer's failure to act in this regard did not comply with reg 11 of the *Regulations*, leading to ultimate irregularities in the conduct of the election.

ANF

95 The ANF made written submissions in reply to the Registrar's submissions concerning the interaction between the *Act*, the *Regulations* and the ANF Rules. The ANF was in general agreement with the Registrar's submissions as to the relationship between the *Act*, the *Regulations* and its Rules. In particular, having regard to s 57 of the *Act*, providing for elections by direct voting systems to be by secret postal ballot, the ANF submitted that it is clear from this provision that in the event of any conflict between the terms of the *Act*, the *Regulations* in relation to elections, and unions rules, then the latter must give way to the former.

96 As to the conduct of an election, the ANF contended that for an election for office holders of the union, there are two alternatives. The first alternative is that the union conducts its own election in accordance with the Rules. It is noted, however, that r 20(3) requires the Returning Officer to be an officer of the WAEC. In the case of a union run election, the cost of the election is borne by the union; no request Is made to the Registrar under s 69 of the *Act;* the union would be required to deal with the WAEC directly in relation to the election; the Registrar would have no involvement in the election process; and the terms of r 23(4)(a), referred to above, would be required to be followed by a Returning Officer to ensure no irregularities or procedural difficulties occur in relation to the election.

97 Alternatively, the election process is one the subject of a request under s 69 of the *Act*, which occurred in this case. The process is somewhat different in that the Registrar makes arrangements with the WAEC for the conduct of the election. The cost of the election is borne not by the union but by the State; that s 69(5) of the *Act*, giving the Returning Officer a discretionary power to take steps to avoid irregularities applies; and also, by s 69(7) of the *Act*, any irregularity in the request

for an election, or a breach of the rules of an organisation in the conduct of an election, or compliance with directions given by a Returning Officer, will not invalidate an election.

98 Accordingly, the overarching submission of the ANF was that given the combined effect of ss 69(5) and 69(7) of the *Act*, contrary to Ms Fenn's submissions, the relevant statutory provisions in the *Act* prevail over the relevant provisions of the ANF Rules. As to the interpretation of s 69(5), the ANF submitted that the word 'notwithstanding' should be construed as meaning and being synonymous with 'despite': ***Attorney General (Cth) v Oates*** [1999] HCA 35; (1999) 198 CLR 162.

99 Finally, as to the matters raised by Ms Fenn concerning reg 11 of the *Regulations*, the ANF submitted that this matter did not arise until the close of the evidence in the proceedings. However, the ANF also submitted that Ms Fenn's case in relation to postal delays and the alleged late receipt or non-receipt of ballots was based largely on hearsay evidence and little was put before the Commission by way of direct evidence, as to actual postal delay. It was submitted that there were no delays in the post, and, in any event, the Returning Officer received only a few requests for replacement ballot papers.

Disposition of preliminary issue

100 As to this preliminary issue, in my view, for the reasons identified by the Registrar in her submissions, the *Act* and the *Regulations* prevail to the extent that either are inconsistent with a union's rules. The laws of the State are paramount. In this case, the mandatory obligation imposed on a Returning Officer, under r 23(4)(a) of the ANF Rules, is inconsistent with the discretionary power of a Returning Officer under s 69(5) of the *Act*. In the Registrar's submissions, reference is made to ***Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd*** [2004] NSWSC 754. In this case, as to the meaning of 'notwithstanding' when used in a statute, Barrett J observed at [12]–[13]:

> … In the present instance, regard may thus be had to cases which have considered qualifications introduced by the word "notwithstanding".
>
> The process of analysis to be followed in such cases was described by Irvine CJ, Cussen J and McArthur J in ***In re Bland Bros and the Council of the Borough of Inglewood (No 2)*** [1920] VLR 522:
>
> > As to the introductory words, the section should first be construed without them, and then, if there is anything in the other provisions of the Act inconsistent with the interpretation so arrived at, these other provisions must yield.

(See too: ***Piper v Corrective Services Commission of New South Wales*** (1986) 6 NSWLR 352; ***Perret v Robinson*** [1988] HCA 41; (1988) 169 CLR 172).

101 When s 69(5) is read in this way, without the introductory words, it enables, as a matter of discretion, a person conducting an election to take certain action and make certain directions for the purposes set out in pars (a) to (c). When one then reads r 23(4)(a) of the ANF Rules, the latter is inconsistent as there cannot be simultaneous compliance with both. A Returning Officer cannot, under s 69(5), decide not to take certain action, as matter of discretion, when r 23(4)(a) requires such action to be taken. The latter must yield to the former. They are inconsistent: ***The Registrar v The Shop, Distributive and Allied Employees' Association of Western Australia*** (1996) 76 WAIG 1705 per Sharkey P at 1707.

The evidence

102 Ms Fenn testified that in her experience nurses' roster patterns and working hours are varied and many who work in remote areas of the State do not access their mail regularly. She also said that many work long shifts and may have family responsibilities, adding to their long work hours and general disruption in their lives. She testified that, in late October 2022, she checked the Australia Post website and there was information on it regarding delivery times estimates for intra- and inter-state mail delivery. The information she found was copied and annexed to her affidavit at SJF9. This material includes the following information:

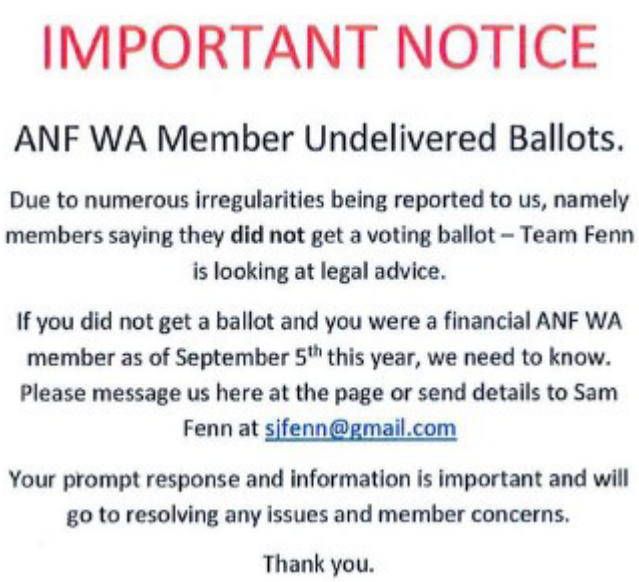
(a) on a national basis, delivery time estimates for same state deliveries for regular letters was up to 4 business days depending on origin and destination (current at 17 October 2022);

(b) in relation to Western Australia, items posted to Western Australia were experiencing delivery delays, Australia Post was delivering over the weekend where possible, and Australia Post was apologetic for any inconvenience caused (current at 18 October 2022);

(c) customers with an enquiry about an undelivered domestic item should wait until 10 business days of the expected delivery date had passed without the item arriving before contacting Australia Post with their enquiry.

103 Furthermore, Ms Fenn said that the Australia Post website had information in relation to deliveries around public holidays which stated 'Please allow for additional delivery time if you're sending time-sensitive material around the time of national, state, regional or local public holidays'.

104 In connection with possible delivery delays, Ms Fenn said that she received complaints from members about the non-receipt of ballot papers. She testified that in response she contacted the WAEC and the Electoral Commissioner by telephone and email to report what members had told her. This was over the period of about 7 to 11 October 2022. Ms Fenn testified that she encouraged those who contacted her to get in touch with the WAEC to report non-receipt of ballot papers. Ms Fenn placed a notice on her Facebook page in the following terms:


IMPORTANT NOTICE

ANF WA Member Undelivered Ballots.

Due to numerous irregularities being reported to us, namely members saying they **did not** get a voting ballot – Team Fenn is looking at legal advice.

If you did not get a ballot and you were a financial ANF WA member as of September 5th this year, we need to know. Please message us here at the page or send details to Sam Fenn at sjfenn@gmail.com

Your prompt response and information is important and will go to resolving any issues and member concerns.

Thank you.

105 After the election result was declared, between about 18 October and 23 October 2022, Ms Fenn said that she requested contact from members who were a part of her Facebook support group, which she entitled 'WA Nurses & Midwives Advocacy' to advise if they had not received ballot papers. Ms Fenn accepted in cross-examination that she did not contact the ANF about this. Bundles of responses to these posts on her Facebook page were annexed at SJF-12 to her affidavit.

106 At SJF-12 to Ms Fenn's affidavit were some 27 messages from named individuals who assert that they did not receive ballot papers. The surnames of these individuals included Holland; Patel; Espinosa; Sumner; Walding; Malony; Baker; Russell; Walker; Moon; Stephen; Clarke; Clelland; Pink; Thames; Takawira; Hagley; Strong (2); Montell; Neve; Rooney; Margaretta; Savill; Broderick; Kjenseth and Arnold.

107 Ms Fenn testified that she also received emails from members who did not receive ballots, which were at annexure SJF-14 to her affidavit. These emails included three members from Geraldton; Rossiter; Donnelly; and Parsons and four others, Irvine; Paul; Tully and Shirley.

108 From the Statement at [94] to [116], a further five members did not receive ballot papers or receive them in time to vote. These included Ward; Read-Smith; Dowling; Luke and Hagley.

109 There were also emails received by Mr Olson from members regarding the non-receipt of ballot papers and these include from Lumsden on 8 October who stated 'quite a few nurses at Bentley have not got ballot papers'. Furthermore, from White on 16 October who did not receive a ballot paper and who lives in East Victoria Park.

110 Then, at 1644-1646 of the ATB, there appears email exchanges between Ms Fenn and Mr Kennedy, the Electoral Commissioner on 11 October 2022. Whilst Ms Fenn was not cross-examined about this email exchange, there appears a list of names attached to an email from a Chris Jenkins to Ms Fenn dated 11 October 2022, which was forwarded to Mr Kennedy. That list contained postcodes and names of what I understand to be ANF members who asserted that they did not receive ballot papers. This understanding arose from an exchange between myself and Ms Fenn's counsel (see 101-103T). This appears to be in response to an email from Ms Fenn to Mr Kennedy of 7 October 2022 (see 1643 ATB), where Ms Fenn then asserts to Mr Kennedy that members, at a list of postcodes set out in the email, had not received their ballot papers.

111 These email exchanges, as set out in the ATB, were the impetus for the WAEC to make enquiries of Australia Post, which I will deal with in more detail when considering the evidence of Mr Ardeshir below. Excluding from the list of names in the forwarded email from Ms Jenkins, those who were referred to earlier by Ms Fenn from information she received through her Facebook Page, the total number of names provided to the WAEC with postcodes was 25. The total number of members named in all of the various communications was some 66 members.

112 Mr Ardeshir is an experienced officer employed by the WAEC and has had approximately 10 years of experience in the conduct of elections, including elections for local governments and unions. Mr Ardeshir has conducted about 50 non-Parliamentary postal elections and testified that he has not had occasion to extend the time for the return of ballots in any of them.

113 As to the timing of the election for the ANF ballot, Mr Ardeshir testified that he made contact with Mr Olson to discuss preliminary dates for the conduct of the election. It was his evidence that, generally speaking, for non-Parliamentary elections by postal ballot, the WAEC usual timing is three weeks. This is the usual practice that is adopted in elections of this kind. Mr Ardeshir's evidence was that he adopted this approach for the purposes of the ANF election and it was conducted in accordance with the union's rules.

114 In that respect, Mr Ardeshir referred to the minimum 14day period specified in the ANF Rules, for the mailout of ballots. In this case, that would mean a last day for lodgement of ballots for distribution by post of 3 October 2022, whereas the actual lodgement with Australia Post was on 27 September 2022. Whilst Mr Ardeshir was questioned about the public holiday declared on Thursday 22 September 2022, as the National Day of Mourning to mark the passing of Her Majesty Queen Elizabeth the Second, Mr Ardeshir did not consider that this had any impact on the ballot result. Nor did the Monday 26 September 2022 public holiday affect the timing of the receipt of ballots in Mr Ardeshir's view.

115 It was Mr Ardeshir's evidence that at no stage did he consider extending the date of the election. His evidence was that to do so has consequences. To extend the date of an election after many or most voters had already cast their ballot, would be unfair on them as it would amount to changing the rules of the game halfway through. Mr Ardeshir's said there was no good cause shown at any time, as to why the dates for the election should be extended.

116 As to the role of Australia Post, Mr Ardeshir said that the WAEC has no control over the delivery of ballots to voters. In referring to his email of 29 September 2022 to Mr Olson, he referred to the 'limitations of the current postal landscape'. His evidence was that he meant the general limits that apply when a postal ballot is conducted and that Australia Post experiences deteriorating conditions for all elections. In this respect, Mr Ardeshir gave an example of delivery drivers only having a certain capacity on each delivery trip. In relation to Australia Post, Mr Ardeshir said that these postal delays are factored into the timetable for each election, and it was no different in this case.

117 Mr Ardeshir referred to concerns being raised by Ms Fenn about Australia Post deliveries and possible delays. He said that the WAEC made contact with Australia Post to investigate. His evidence was that the response provided by Australia Post, after conducting an investigation in relation to the complaint, was that there were no delays in processing at the distribution centres for mail delivery. Mr Ardeshir also spoke directly with Ms Fenn about concerns that she had raised in this regard, and he informed her that there are always issues in relation to postal voting and it is a limitation of a postal voting election, which occurs in all voluntary postal election ballots.

118 As to the question of non-receipt of ballots or the replacement of ballot papers, it was Mr Ardeshir's evidence that there is an onus on electors to ensure that they are properly enrolled to vote, and this was the ANF's responsibility. Where a member claims to be eligible to vote, but they are not on the Roll of Electors, then it is for the member to satisfy the WAEC that they are eligible to vote, before ballot papers can be sent to them. Mr Ardeshir made the point that, if an elector has not received ballot papers, they need to contact the WAEC. This is an onus which is on all voters for all elections. He testified that the WAEC cannot possibly follow up on thousands of potential voters to ensure that they receive ballot papers. Mr Ardeshir's evidence was that this onus applies in all elections, including local government and other non-Parliamentary elections.

119 Mr Ardeshir referred to the contact he had with Mr Olson on 29 September 2022 to review an email that Mr Olson was proposing to send to members about the timing for the vote and receipt of ballot papers. Mr Ardeshir's evidence was that included in the email to members was a request that if members had not received ballot papers by 11 October 2022, then they should contact the WAEC, and members were also given the telephone number at the WAEC to make contact. He said that despite this request, only a very small percentage of the total number of voters made such contact. Where contact was made, and the WAEC was satisfied that the member was eligible to vote, then replacement ballot papers were sent by express post, despite no requirement that express post be used. The email also reminded members that ballot papers must be received by Monday 17 October 2022. After that date they would not be taken into account and, therefore, ballots should be returned as soon as possible after being received.

120 In cross-examination, Mr Ardeshir testified that having regard to all these matters, he had no concerns in relation to the receipt or non-receipt of ballot papers for the ANF election. Of the small number of electors whose address for receipt of ballot papers was incorrect on the Roll, they were provided with replacement ballot papers. Mr Ardeshir also testified that, when the WAEC contacted Australia Post to investigate the possible delays in receipt of ballot papers, he did discuss the possibility of an extension with Mr Olson. However, Mr Ardeshir was not of the view any extension was necessary.

121 It was also put to Mr Ardeshir in cross-examination, that the provision of a number of postcodes in email exchanges between Ms Fenn and the WAEC, where Ms Fenn asserted members in those areas had not received ballot papers, was evidence of delivery failure. It was Mr Ardeshir's evidence that, in relation to this issue, as the Returning Officer, he had no specific information to act upon. There had been no direct contact from the voters concerned in those areas with the WAEC to check whether they were eligible to vote and to receive replacement ballots. His evidence was had they done so, and he was satisfied that they were eligible to vote, it was very likely they would have received ballots in time to return them by the election date.

122 Furthermore, in response to questions put to him in relation to the Australia Post enquiries, Mr Ardeshir's evidence was that he took the Australia Post responses as being evidence that there were no problems with Australia Post as no ballots were left on hand at the delivery centres. Whilst Mr Ardeshir accepted that the response from Australia Post did not refer to possible delivery delays, he could not agree with the benefit of hindsight, that that was any reason to extend the time for the election. Mr Ardeshir testified that the WAEC went to Australia Post when Ms Fenn raised her concerns. They identified no problems from their end. His evidence was that the WAEC did all it could as they investigated the matter and determined that there were no delays in the processing of ballots. He said that, from the results of the Australia Post enquiries, there was nothing further for the WAEC to investigate or make a decision on as to whether the election timing should be extended.

123 It was also put to Mr Ardeshir by Ms Fenn that the 23 members contained in exhibit A2, who did receive replacement ballot papers, could have been affected by delays by Australia Post. Whilst Mr Ardeshir initially indicated that could have been the case, an objection was taken to the questions put by counsel for Ms Fenn, on the basis that there was no evidence as to the reasons for members requesting replacement ballot papers, which reasons could have included a number of others than non-receipt by Australia Post. However, despite this, Mr Ardeshir testified that this list of 23 names would not be considered a reason to extend the ballot, as it represented only a very small number of the total number of ballots posted out to members.

124 Mr Ardeshir also gave some evidence as to the 2018 ANF State election and accepted that there was a higher participation rate of 18% in that election, as opposed to a 12% participation rate for the 2022 election. Despite this, Mr Ardeshir was firmly of the view that there were no irregularities in relation to the ANF election.

125 Reference was also made by Ms Fenn to the ANMF federal branch election in December 2021, as set out at 1842 of the ATB. In this regard, Mr Ardeshir noted that the extension of the timetable by the AEC for the federal branch election, of a further 14 days, was because of concerns regarding the coronavirus pandemic and its impact on members fully participating in the election. Mr Ardeshir also noted that the participation rate in that election, as set out at 1845 of the ATB, was 11%, a figure less than the ANF State election participation rate.

126 Finally, as to the 446 late return ballots received, it was Mr Ardeshir's evidence that this was a very small number of the 35,988 total ballots sent to members, and was less than the late return ballots for the 2018 ANF State election.

127 I have already concluded that, in this case, in accordance with an election conducted under s 69 of the *Act*, the Returning Officer, as the person conducting the election, has a discretion to act in accordance with s 69(5). It is no small thing to overturn an election for officeholders in an organisation. Where the will of the members is expressed in a ballot, it is only in cases where there has been a 'demonstrable interference with the full and free expression of the right to vote', that the ballot outcome should be set aside: ***Rogers v Sideris and Ors and Tomlinson*** (1983) 64 WAIG 262 per O'Dea P at 264. Due deference is to be given to the judgement and decisions of an experienced Returning Officer: ***Sideris*** per O'Dea P at 263 and 264.

128 As to the general role of a Returning Officer in the conduct of an election, judicial consideration has been given to the capacity to challenge the exercise of a discretion by a Returning Officer in the discharge of their functions. In this respect, Keely J in ***Re Birch; Re Australian Workers Union (SA Branch) (No2)*** (1991) 37 IR 420, in hearing an election inquiry under the then *Industrial Relations Act 1988* (Cth) observed at 424:

> The question before the Court is not whether it was desirable that the returning officer should have advertised those matters to the members. It is not for the Court to decide whether he should have taken that course. Mr Marshall referred the Court to *Re Carter; Re Federated Clerks Union of Australia, Victorian Branch (No 1)* (1989) 32 IR 1 at 4 where Gray J said:
>
> > "... the Court must act with care. It has no jurisdiction to sit on appeal from the returning officer, for the purpose of determining whether his or her decision was correct. If faced with the task of deciding what was an appropriate direction, the Court may have taken a different view from that taken by the returning officer. The Court is not charged with that function. Unless the direction of a returning officer is wrong in law, or such that no reasonable returning officer could have given it, or the exercise of the power to give a direction is not a bona fide exercise of that power, for the purpose for which the power is given, the Court should not interfere."
>
> Gray J was there dealing with a somewhat different question, namely, whether a direction of a returning officer had given rise to an irregularity; in the present case the alleged irregularity related not to a direction but to an alleged failure to take action to ensure that no irregularities occurred (ie a failure by him to advertise certain matters (see par 10(a) above)). However, in my opinion the principle enunciated by Gray J in *Re Carter* as to the limited role of the Court is equally applicable to an alleged irregularity consisting of a failure by the returning officer to take action.

129 (See too ***Re Application for an enquiry into an election for officers in the Transport Workers' Union of Australia, Western Australian Branch*** (FCA Lee J unreported 11 April 1990 at 39; contra ***Re Communication Workers' Union of Australia Postal and Telecommunications Branch, New South Wales*** (1996) 67 IR 246 per Moore J at 257.)

130 For present purposes, I prefer the approach of Keely J, Gray J and Lee J in the cases cited above. It is not for me to place myself in the Returning Officer's chair and to decide for myself whether I would have made the same decisions as the Returning Officer did in this case, based on what he had before him during the conduct of the election. It needs to be established that the Returning Officer's decision making, and conduct was affected by an error, whether it be of law, or by failing to have regard to relevant considerations or taking into account irrelevant considerations, in making a decision or determination, or not making one, as the case may be.

131 It is with these observations in mind that I turn to consider the relevant statutory provisions and provisions of the ANF Rules, in light of the evidence that I have outlined above.

132 The starting point must be the ANF Rules as to the elections, and in particular, the conduct of a ballot. Also, given that the election the subject of these proceedings was conducted under s 69 of the *Act*, the *Regulations* are also relevant. There is no issue raised in these proceedings as to steps taken by the Returning Officer in relation to nominations for office, or other preliminary obligations imposed on him under the *Regulations*. The issue in these proceedings relates to the conduct of the ballot, in particular the time frames allocated by the Returning Officer for the preparation, dispatch, and receipt of ballot papers, in accordance with the nominated election date of 17 October 2022.

133 The obligation on a Returning Officer under the *Regulations* in relation to an election ballot conducted under s 69 of the *Act* is specified in reg 11. It provides as follows:

> **11. Commencement and close of ballot**
>
> Where more than one candidate is nominated for election for an office, the returning officer shall determine the date of commencement of issuing ballot papers and the time and date of the close of the ballot having regard to —
>
> (a) the date of expiration of the term of office of the holder of the office;
>
> (b) the time required to send and return ballot papers by post;
>
> (c) the time required to complete the election; and
>
> (d) the provisions of the rules of the union relating to the times and dates of the commencement and close of the ballot in respect of the election.

134 As to reg 11(d), this refers to a union's rules in relation to the commencement and close of a ballot, as a part of the obligation on a Returning Officer to determine the relevant dates. In this respect, r 23(1)(g) of the ANF Rules provides as follows:

> (g) With all convenient speed but not later than fourteen days before the ballot is to be held, send to each member the following papers by prepaid post in a sealed envelope:

(i) a notice setting out the reasons for taking the ballot and the date and place and hour appointed for the closing of the ballot,

(ii) a ballot paper,

(iii) a notice that the ballot paper of any member whose subscription is overdue will not be counted,

(iv) a prepaid stamped addressed envelope addressed to the Returning Officer for the return of ballot papers with on its reverse side a space for the voter to both print and sign his or her name,

(v) material pursuant to Sub-rule (5) of Rule 20.

135 Thus, the period for the conduct of a ballot is at least 14 days. It seems clear enough, from reg 11 read as a whole, that this is an important consideration. The time period specified in a union's rules for the conduct of a ballot is a matter a Returning Officer is required to have regard to, amongst a number of considerations. Whilst Ms Fenn complained about the timetable for the election, there was no breach of r 23(1)(g). This rule was complied with in this case. However, the obligations imposed by regs 11(b) and (c) are also material to a Returning Officer's consideration. As to reg 11(c), which deals with the time required to complete the election, this would normally be the period set out in a relevant union rule. In this case, that is r 20. However, for reasons earlier explained, the election could not be conducted within this period, and the relevant period became that dealt with in my reasons and orders of 3 August 2022 and 4 August 2022, referred to above. In accordance with those reasons and orders, the election was to be conducted as soon as possible, with the process to commence 'forthwith', and the latest possible date for completion of the election was 30 November 2022.

136 Accordingly, it was incumbent on the Returning Officer to be aware of the latest date for the completion of the election by 30 November 2022, and on the evidence, he was not. With respect to Mr Ardeshir, he should have been aware of this date as a part of his decision making and the obligations imposed on him by reg 11. This is to ensure that any decisions made by a Returning Officer, for the purposes of reg 11, are fully informed decisions. Whether this ultimately led to an irregularity for the purposes of s 66(2)(e) of the *Act,* however, is a matter I deal with further below.

137 As to the evidence concerning alleged late or non-receipt of ballot papers, much of the evidence of Ms Fenn was second hand. Aside from the Statement, setting out those members who raised questions as to the non-receipt of ballot papers and those who were sent replacement ballot papers (at [62] to [72] and [94] to [116] Statement), there was no direct evidence before the Commission from those who alleged they did not receive ballot papers or received them too late to be counted.

138 Even taking the numbers of members asserting they did not receive ballot papers or received them too late at its highest, there was no direct evidence before me as to the specific cause. I cannot regard the indirect evidence before me as being 'weighty': ***Pullin*** per Gray J at [21]. Even so, as noted above, and even assuming the non-receipt of ballots was due to postal delays (about which I have no direct evidence), can this factor, in and of itself, constitute an 'irregularity' for the purposes of ss 7 and 66(2)(e) of the *Act*?

139 In this respect, I refer to ***Pullin***, being a case in which similar allegations were raised as are in these proceedings. In ***Pullin***, an election took place for officeholders in the New South Wales branch of the Federated Liquor, and Allied Industries Employees Union of Australia. The election was conducted by the AEC. An issue arose in that case as to the financial status of members of the union, raised after the primary roll of electors had been prepared, which meant supplementary rolls had to be prepared also. A second issue related to ballot papers being sent to members' work addresses, and whether the employers concerned had passed them on to the relevant member. Neither of these issues arise in this case.

140 The applicant in ***Pullin*** complained that an irregularity occurred in the election because of the timing of the posting of ballot papers to those on the supplementary roll of electors. It was contended that the Returning Officer in that case should have extended the time for the election. As to this argument, based on the evidence, Gray J observed at 15-16 as follows:

> The applicant's original claim was that, because of the late posting of ballot papers to these voters, the returning officer ought to have extended the closing date of the ballot, and that an irregularity occurred because of his failure to do - that. No irregularity could be established on that basis. No provision of the branch rules or of the Act, and no principle of law, imposes on a returning officer any duty to extend the period during which votes may be cast. Indeed, there are circumstances in which a decision to extend the closing date might give rise to an irregularity; it might be claimed that the result of an election turned on votes received outside the voting period laid down originally, and that notice of the extension of the voting period had not been given to all voters.
>
> Even if it could be said that the returning officer in the present case had made a decision not to extend the ballot (as opposed to not making a decision to extend it), it would not be open to the Court simply to substitute its view of whether such a decision should have been made for the view of the returning officer, and to find that an irregularity had occurred as a result of the decision made. The grounds on which a decision of a returning officer can be attacked in an election inquiry appear to be limited to those applicable to any administrative decision. In *Re Application by Porter for an inquiry into an election in the Transport Workers' Union of Australia* (Federal Court of Australia, Gray J., 23rd June 1989, unreported), at p. 76, it was said:
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> > "The Court does not review directions given by a returning officer under a provision such as s.170A(l) [of the *Conciliation and Arbitration Act 1904*].

141 In ***Pullin***, Gray J concluded, on the basis of some evidence before him, that an unknown number of members may not have received ballots because their employers did not pass them on to the members. Alternatively, others may not have received ballots because of the failure of persons to pass on the financial status of members in time for a member to be placed on the primary roll of electors and to be posted ballot papers. His Honour concluded at 21 that this conduct constituted an irregularity. As I have mentioned, however, no such conduct occurred in this case. All 35,988 ballot papers were lodged with Australia Post for delivery at the same time on 27 September 2022.

142 I also note that regardless of the absence of factors arising in cases such as ***Pullin***, in this case, the lodgement of ballot papers on 27 September 2022, even allowing for the unexpected public holiday on 22 September 2022 and the proclaimed public

holiday on 26 September 2022, still provided 20 days for the delivery and return of ballot papers. All of this was in accordance with the ANF Rules.

143 As I have already said above, the evidence before me is somewhat scant as to the reasons some members may not have received their ballot papers. Some of them may not have maintained correct addresses in the ANF membership database, which under r 7(2) of the ANF Rules, is a member responsibility. I am not able to conclude that all of those who claimed to not receive ballot papers, did not receive them for other reasons such as lost papers; being absent at the time of the receipt of papers; or whether they may not have been passed on by family members, etc. Of course, this is all speculative.

144 As to the broader issue of the non-receipt of ballot papers and whether, in the context of union elections, such could constitute an irregularity, in ***Nimmo***, again, similar allegations to those raised in this case were traversed. This case involved an election enquiry under the *Fair Work Act 2009* (Cth), in relation to an election for the office of Branch Secretary of the Australian Education Union, Northern Territory Branch, conducted by the AEC.

145 In that case, one complaint advanced was that ballot papers that were posted to some members were returned unclaimed or not received at all. In considering these complaints, Reeves J concluded the situation before him was distinguishable from that before the court in ***Pullin***. Also, Reeves J commented generally as to the issue of the non-receipt of ballot papers by post in an election for an office in an organisation, and observed at [33] to [36] as follows:

> 33 In any event, I do not consider the mere non-receipt of a ballot paper, in the circumstances of this case, can be said to involve an irregularity as defined in subparagraph (b) of s 6 of the Act. In r *v Gray; Ex parte Marsh* (1985) 157 CLR 351 ("*Ex parte Marsh*"), the High Court considered an almost identical provision to subparagraph (b) in relation to an alleged irregularity in a union election under the *Conciliation and Arbitration Act 1904* (Cth). In construing the definition of the word "irregularity", Gibbs CJ observed (at 364–5) that the definition was an inclusive one and extended to the ordinary meaning of that word. Then (at 367–8) his Honour referred to the *Oxford English Dictionary* definition of that word and said that: "The notion of an irregularity, in relation to an election, involves the idea of some departure from some rule, established practice or generally accepted principle governing the conduct of the election." These observations were subsequently applied by all the members of the Court in *Re Collins; Ex parte Hocking* (1989) 167 CLR 522 ("*Re Collins*") at 524–5 per Brennan and Deane JJ; 526 per Toohey and McHugh JJ; and 528–9 per Gaudron J.
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> 34 The obvious purpose of these provisions of the Act is to ensure that elections for important positions in industrial organisations are conducted fairly and democratically. The words "full and free" in subparagraph (b) must therefore be construed to advance that purpose. However, those words must also be construed having regard to their context in the Act as a whole and, among other things, the practicalities of the situation to which they apply. In this regard, it is important to note that if Mr Nimmo's contention were correct, it would essentially mean that a Returning Officer conducting an election of this kind under the Act would have to guarantee the delivery of all ballot papers to all eligible voters before it could be said that there had been a <u>full</u> recording of the votes of all persons who are entitled to vote. In this case, that would mean guaranteeing the delivery of ballot papers to 1,904 members living throughout the Northern Territory. In my view, such a construction would place an impossible burden on the Returning Officer. The obvious impracticality, expense and uncertainty that would be created in this, and all similar elections under the Act if that approach were to be adopted, tell heavily against subparagraph (b) being construed in this way: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]–[70] and [97]–[98].
>
> 35 Furthermore, I consider the context of subparagraph (b) requires the act or omission concerned to be linked to, or involve, some departure from some norm or standard. As *Ex parte Marsh* shows, that is the ordinary meaning of the word "irregularity". That is also what is required by subparagraph (a) – a breach of a rule of the organisation – and subparagraph (c) – a breach of s 190 of the Act. At the same time, this does not mean that I consider the act or omission must involve some intentional wrongdoing. Nor do I consider it means, at the other end of the spectrum, that inefficiency, mere error, or neglect, would suffice.
>
> 36 It follows that I consider Mr Nimmo needs to show, on the balance of probabilities, that the non-receipt of these 21 ballot papers was linked to, or involved, a departure from some norm or standard. In my view, he has failed to do that. He did not allege that any of the rules of the Union had been breached and he accordingly eschewed any reliance on subparagraph (a) of the definition of "irregularity". Similarly, he did not rely upon subparagraph (c) of the definition. Nor did he point to any established rule, practice, or accepted principle that had not been followed by Ms Roper, or someone else connected with this election. Instead, he relied solely on the non-receipt of the ballot papers without producing any evidence to explain how that involved some departure from some specified norm or standard. It hardly needs to be said that there is any number of regular explanations for the non-receipt of a ballot paper through the mail. They include a change of address (already mentioned above), a failure by a member of a household to pass on the mail, an absence on leave, or through illness, or even some delay or error within Australia Post.

146 Similarly, in this case, I cannot conclude that there has been a departure from some rule, established practice, or generally accepted principle governing the conduct of an election: ***R v Gray*** per Gibbs CJ at 364-365. On the contrary, on the evidence before me, r 23(1)(g) of the ANF Rules was met. The uncontradicted evidence of the Returning Officer, Mr Ardeshir, an experienced Returning Officer, is a period of three weeks for the conduct of such an election is normal and is applied to all non-Parliamentary postal elections, including those for local government elections involving hundreds of thousands of ballots. It must be accepted that a postal ballot will be subject to some limitations, but those limitations apply to all such ballots. The conduct of the ballot by the WAEC in this case did not involve any departure from a rule, established practice, or generally accepted principle. On the evidence, it was consistent with it.

147 Ms Fenn referred to two decisions of the Commission under s 66 of the *Act* that were said to relate to postal delays. The first was ***Dwyer v President and Returning Officer, State School Teachers' Union of WA (Inc)*** (1990) WAIG 3980. In this case, Mr Dwyer was a prospective candidate in an election for office in the State School Teachers' Union. He posted his nomination in the correct form on 7 August 1990, but it was not received at the union office until 22 August 1990, some five days after the closing date for nominations for office. Mr Dwyer made application under s 66 of the Act for orders from the President that his nomination be taken to be valid. It was unclear on the evidence before the Commission what the cause of the delay was.

148 Whilst orders were made by the President in favour of Mr Dwyer, the case is distinguishable on its facts from the present matter. It concerned a nomination for office, in circumstances where the cause of the lateness was not ascertainable. It was not a matter of a challenge to an election outcome under s 66(2)(e) of the *Act*. The case did not involve any of the considerations that I have outlined above.

149 The second case was ***Avenell and Another v The Returning Officer, State School Teachers' Union of WA (Inc)*** (1993) 73 WAIG 2939. This matter concerned nominations for branch delegate participation in the union's 1993 conference. A second application was dealt with at the same time, involving a similar issue. It appeared that the nomination form did not arrive in the post at all. Accordingly, the Returning Officer could not regard the nominations as valid. Having regard to the circumstances, the President granted the orders sought. In doing so, however, the President, at 2940, cautioned that such errors would not be remedied on every occasion that arises. As in the ***Dwyer*** case, this matter is distinguishable on the same basis. Additionally, it is fair to observe that the grant of orders was exceptional.

150 I have noted above that Mr Ardeshir should have been aware of the outer limit of 30 November 2022 to complete the election. However, this was some nine weeks after the depositing of the ballot papers with Australia Post on 27 September 2022. Such a distant date does not bear on the appropriateness of the Returning Officer adopting the usual timetable of three weeks for a postal ballot election such as the ANF election, and therefore is not material, in my view, for the purposes of s 66(2)(e) of the *Act*.

151 It must also be said that ANF members bore some responsibility in relation to the conduct of the election. The email from Mr Olson, which Mr Ardeshir contributed to, which was sent to members on 29 September 2022, urged members who had not received ballot papers by 11 October 2022 to contact the WAEC on the telephone number provided to enquire about a replacement ballot paper package. Very few did. Only 23 members took this step, and they received replacement ballot papers by express post. There was no evidence before me as to why the other members, referred to by Ms Fenn in her evidence, did not do the same. Those persons referred to at [94] to [116] of the Statement certainly did not. As Reeves J observed in ***Nimmo***, the AEC (and in this case, the WAEC) could not possibly guarantee the delivery of each ballot paper. In this case, some 36,000 of them. It would be an impossible task to do so. Accordingly, as in ***Nimmo,*** ss 7 and 66(2)(e) of the *Act* could not be construed to oblige the WAEC to provide such a guarantee.

152 It is also material to note that the 2022 State election for the ANF did not depart from the timing of the 2018 State election. The number of late returned ballots of 446 for the 2022 election was less than the number of late returned ballots for the 2018 election. Also, there was a total number of unclaimed and returned to sender ballot papers of 463 (ATB 1689-1719). There was no suggestion on the evidence that this was unusual. What this latter evidence does show, in my view, is the limitations of a postal ballot generally. Specifically, not all ANF members maintained accurate address records, as is their responsibility under the ANF Rules.

Conclusion

153 On all of the evidence before me, I cannot conclude that the Returning Officer was under any obligation, as a matter of law, on the principles discussed above, to extend the election in this case. Further, I cannot conclude on the evidence that the election was conducted in such a manner that involved a departure from some rule, established practice, or generally accepted principle governing the conduct of an election, so as to constitute an irregularity requiring my intervention under s 66(2)(e) of the *Act*. Whilst I do not doubt the good intentions of Ms Fenn, and her desire to contest the election and stand for office, the application must be dismissed.

2023 WAIRC 00807

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SAMANTHA FENN **APPLICANT** **-v-** THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH **FIRST RESPONDENT** THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION **SECOND RESPONDENT** THE REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION **INTERVENOR**
CORAM	CHIEF COMMISSIONER S J KENNER
DATE	TUESDAY, 10 OCTOBER 2023
FILE NO/S	PRES 10 OF 2022
CITATION NO.	2023 WAIRC 00807

Result	Application dismissed
Appearances	
Applicant	Mr D Rafferty of counsel
First Respondent	Ms B Burke of counsel
Second Respondent	Ms S Keighery of counsel
Intervenor	Mr J Carroll of counsel

Order

HAVING heard Mr D Rafferty of counsel on behalf of the applicant, Ms B Burke of counsel on behalf of the first respondent, Ms S Keighery of counsel on behalf of the second respondent and Mr J Carroll of counsel on behalf of the intervenor, the Chief Commissioner, pursuant to the powers conferred on him under the *Industrial Relations Act 1979*, hereby orders –

THAT this application be and is hereby dismissed.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2023 WAIRC 00791

APPEAL AGINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 30 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUY LITTLE
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T KUCERA
DATE	WEDNESDAY, 4 OCTOBER 2023
FILE NO.	APPL 52 OF 2023
CITATION NO.	2023 WAIRC 00791

Result	Direction issued
Representation	
Appellant	Mr M Cox of counsel
Respondent	Ms A Miller of counsel

Direction

HAVING heard Mr M Cox of counsel on behalf of the appellant and Ms A Miller of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Police Act 1892* (WA), hereby directs –

(1) THAT the appellant file an outline of submissions and a list of authorities by no later than 31 October 2023.

(2) THAT the respondent file an outline of submissions and a list of authorities by no later than 21 November 2023.

(3) THAT the appeal be listed for hearing on 5 and 6 December 2023.

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

By the Commission

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

2023 WAIRC 00792

APPEAL AGINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 30 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUY LITTLE
	APPELLANT
	-v-
	WAPOL
	RESPONDENT
CORAM	CHIEF COMMISSIONER S J KENNER
	COMMISSIONER T EMMANUEL
	COMMISSIONER T KUCERA
DATE	WEDNESDAY, 4 OCTOBER 2023
FILE NO/S	APPL 52 OF 2023
CITATION NO.	2023 WAIRC 00792

Result	Order issued
Representation	
Appellant	Mr M Cox of counsel
Respondent	Ms A Miller of counsel

Order

HAVING heard Mr M Cox of counsel on behalf of the appellant and Ms A Miller of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Police Act 1892* (WA), hereby orders –

THAT the name of the respondent be amended by the deletion of the name "WAPOL" and the insertion in lieu thereof the name "Commissioner of Police".

By the Commission

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2023 WAIRC 00759

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 18 SEPTEMBER 2023
FILE NO.	B 28 OF 2023
CITATION NO.	2023 WAIRC 00759

Result	Direction issued
Representation	
Applicant	Mr M Cox (of counsel)
Respondent	Mr D White (of counsel)

Direction

HAVING received a minute of proposed consent order signed by the parties' representatives, the Commission, pursuant to the powers conferred under *the Industrial Relations Act 1979* (WA), and by consent, hereby directs –

THAT the Directions issued on 13 September 2023 ([2023] WAIRC 00751) to the extent that they refer to the parties filing a statement of agreed facts be vacated, and the date by which the parties are to file a statement of agreed facts, stated in Direction 2 of the Directions issued on 14 August 2023 ([2023] WAIRC 00689), be extended to Monday, 18 September 2023.

(Sgd.) C TSANG,
[L.S.] Commissioner.

2023 WAIRC 00777

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BANG ANH NGUYEN
	APPLICANT
	-v-
	ARCTURUS NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 29 SEPTEMBER 2023
FILE NO.	B 34 OF 2023
CITATION NO.	2023 WAIRC 00777

Result	Directions issued
Representation	
Applicant	Mr H Tran of counsel and Mr V Nguyen of counsel
Respondent	Mr W Kadir of counsel

Direction

HAVING HEARD from Mr H Tran of counsel and Mr V Nguyen of counsel on behalf of the applicant and Mr W Kadir on behalf of the respondent, the Commission pursuant to the powers conferred upon it under the *Industrial Relations Act 1979* (WA), and by consent, hereby DIRECTS –

1. THAT the parties are to provide informal discovery by 10 November 2023;
2. THAT evidence in chief in this application will be provided by way of signed witness statements, which will stand as the evidence in chief of their maker. Evidence in chief, other than that contained in the witness statements, may only be provided by leave of this Commission;
2. THAT the applicant file his evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021 together with any documents upon which he intends to rely by 8 December 2023;
3. THAT the respondent file its evidence in chief in the form of witness statements in the manner required by practice note 9 of 2021, together with any documents upon which it intends to rely on by 12 January 2024;
4. THAT the matter be listed for a further conciliation conference not before 12 January 2024;
5. THAT there be liberty to apply on short notice.

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

2023 WAIRC 00800

DISPUTE RE DISMISSAL OF EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A.
	APPLICANT
	-v-
	GOVERNING COUNCIL OF NORTH METROPOLITAN TAFE
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	FRIDAY, 6 OCTOBER 2023
FILE NO.	C 38 OF 2023
CITATION NO.	2023 WAIRC 00800

Result	Direction issued
Representation	
Applicant	Mr D Rafferty (of counsel)
Respondent	Mr J Carroll (of counsel))

Direction

WHEREAS on 29 September 2023, the applicant filed a *Form 1B – Application for a Conference - s 44, Industrial Relations Act 1979*;

AND WHEREAS on 5 October 2023, the respondent filed a *Form 1A – Multipurpose Form* raising a jurisdictional objection (**Application**);

NOW THEREFORE having received a minute of proposed directions signed by Mr D Rafferty (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under *the Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the Application be listed for hearing not before Monday, 30 October 2023;
2. THAT the parties file a statement of agreed facts by Wednesday, 11 October 2023;
3. THAT the applicant file an outline of written submissions in response to the written submissions set out in the Application by Wednesday, 18 October 2023;
4. THAT the respondent file any outline of written submissions in reply by Wednesday, 25 October 2023.
5. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2023 WAIRC 00803

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 17 MAY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRISTA CAROLE JEWELS BURKE
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER C TSANG – CHAIR MR G LEE – BOARD MEMBER MS E HAMILTON – BOARD MEMBER
DATE	TUESDAY, 10 OCTOBER 2023
FILE NO.	PSAB 17 OF 2023
CITATION NO.	2023 WAIRC 00803

Result	Direction issued
Representation	
Appellant	Mr S Pack (of counsel)
Respondent	Ms E Negus (of counsel)

Direction

HAVING heard from Mr S Pack (of counsel) on behalf of the appellant and Ms E Negus (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the appellant be granted leave to file any further or replacement outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 27 October 2023.
2. THAT Direction 2 of the Directions issued on 11 September 2023 ([2023] WAIRC 00742) be vacated, and the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) by Friday, 10 November 2023.
3. THAT Direction 3 of the Directions issued on 11 September 2023 ([2023] WAIRC 00742) be vacated, and the appellant file an outline of submissions and a list of authorities by Friday, 24 November 2023.
4. THAT the respondent file an outline of submissions and a list of authorities by Monday, 4 December 2023.
5. THAT the appeal be listed for hearing on Monday, 11 December 2023.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00804

APPEAL AGAINST THE DECISION OF THE EMPLOYER TAKEN ON 7 FEBRUARY 2023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK LAWN
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF JUSTICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER C TSANG – CHAIR
	MR G BROWN – BOARD MEMBER
	MS L BRICK – BOARD MEMBER
DATE	TUESDAY, 10 OCTOBER 2023
FILE NO.	PSAB 18 OF 2023
CITATION NO.	2023 WAIRC 00804

Result	Direction issued
Representation	
Appellant	Mr M Lawn (on his own behalf)
Respondent	Mr D Anderson (of counsel)

Direction

HAVING heard from Mr M Lawn on his own behalf and Mr D Anderson (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 –

THAT Direction 3 of the Directions issued on 5 September 2023 ([2023] WAIRC 00736) be vacated, and the date by which the parties are to file a statement of agreed facts and bundle of agreed documents be extended to Monday, 16 October 2023.

(Sgd.) C TSANG,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2023 WAIRC 00789

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MATTHEW TRAN
	APPLICANT
	-v-
	EAST METROPOLITAN HEALTH SERVICE AND ANOTHER
	RESPONDENTS
CORAM	COMMISSIONER T B WALKINGTON
DATE	TUESDAY, 3 OCTOBER 2023
FILE NO.	S 7 OF 2023
CITATION NO.	2023 WAIRC 00789

Result	Direction issued
Representation	
Applicant	Mr M Tran (in person)
Respondents	Mr J Carroll (of counsel)

Direction

WHEREAS on 30 June 2023 the applicant filed an application pursuant to s 51BJ of the *Industrial Relations Act 1979* (WA) for an order to stop bullying (bullying application);

AND WHEREAS the bullying application was listed for a Directions Hearing on 3 October 2023, to program the bullying application towards hearing and determination;

AND WHEREAS at this Directions Hearing, the applicant confirmed he seeks for the respondents to provide discovery of documents;

NOW THEREFORE having heard from Mr Tran on his own behalf and Mr Carroll on behalf of both respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs:

1. THAT the applicant file a *Form 1A – Multipurpose Form – Request for Discovery* (applicant's discovery application) by no later than 10 October 2023;
2. THAT the respondents file a response to the applicant's discovery application by no later than 17 October 2023, and in the event the respondents object to the applicant's discovery application;
3. THAT the applicant's discovery application be listed for hearing, on a date to be determined, and not before 24 October 2023.

(Sgd.) T B WALKINGTON,

[L.S.] Commissioner.

2023 WAIRC 00760

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP TRESTRAIL
	APPLICANT
	-v-
	CITY OF KARRATHA
	RESPONDENT
CORAM	COMMISSIONER C TSANG
DATE	MONDAY, 18 SEPTEMBER 2023
FILE NO.	U 28 OF 2023
CITATION NO.	2023 WAIRC 00760

Result Direction issued
Representation
Applicant Mr M Cox (of counsel)
Respondent Mr D White (of counsel)

Direction

HAVING received a minute of proposed consent order signed by the parties' representatives, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979 (WA), and by consent, hereby directs –

THAT the Directions issued on 13 September 2023 ([2023] WAIRC 00752) to the extent that they refer to the parties filing a statement of agreed facts be vacated, and the date by which the parties are to file a statement of agreed facts, stated in Direction 2 of the Directions issued on 14 August 2023 ([2023] WAIRC 00690), be extended to Monday, 18 September 2023.

(Sgd.) C TSANG,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Arts and Culture Trust Venues Management MEAA Agreement 2022 AG 23/2023	21/09/2023	Arts and Culture Trust	Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	Commissioner T Emmanuel	Agreement registered
City of Kalamunda Operational Workforce Agreement 2023 AG 21/2023	10/10/2023	City of Kalamunda	Local Government, Racing and Cemeteries Employees Union (WA)	Commissioner T Emmanuel	Agreement registered
Department of Fire and Emergency Services - Fleet and Equipment Services Agreement 2022 AG 22/2023	22/09/2023	Department of Fire and Emergency Services	The Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union Of Workers - Western Australian Branch	Commissioner T Emmanuel	Agreement registered
Shire of Mundaring Administrative Employees Enterprise Agreement 2023 AG 20/2023	05/10/2023	Shire of Mundaring	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered